

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

B
P/S

No. 74-1035

United States Court of Appeals

FOR THE SECOND CIRCUIT

LODGES 700, 743, and 1746,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

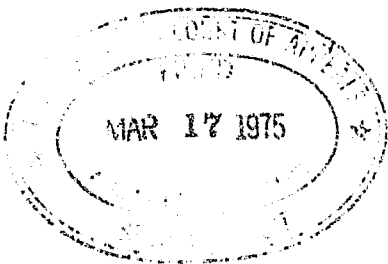
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Intervenor.

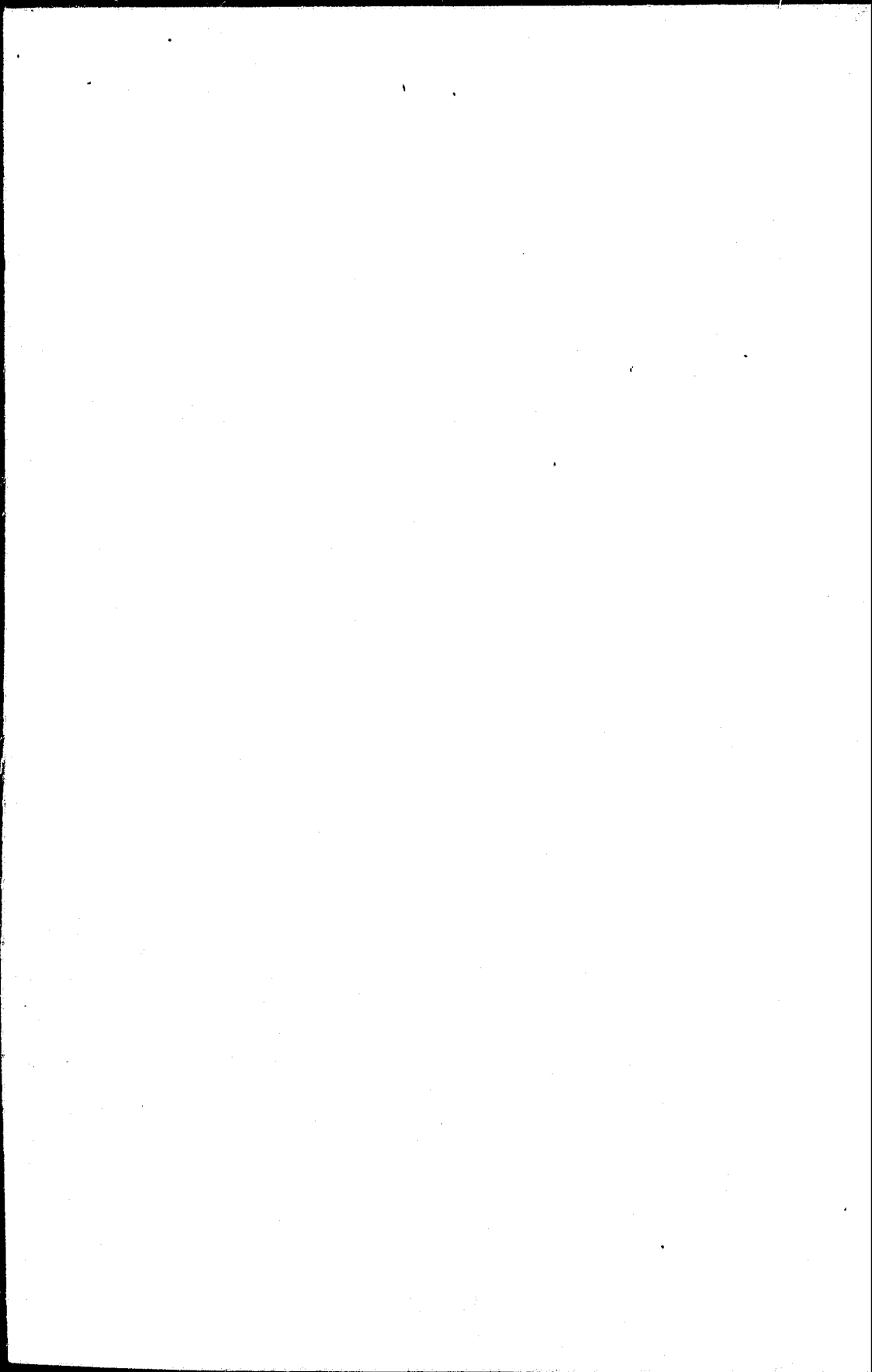
On Petition For Review Of An Order
Of The National Labor Relations Board

BRIEF FOR PETITIONERS

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INDEX

	Page
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	2
I. INTRODUCTION	2
II. UNITED AIRCRAFT'S HISTORY OF UNFAIR LABOR PRACTICES	5
III. THE VIOLATIONS ALLEGED IN THE INSTANT PROCEEDING	7
A. Coercive Interrogation and Harassment of Union Supporters and Stewards	7
1. The Suspension and Interrogation of Sullivan	7
2. The Interrogation and Suspension of Steward Raymond	12
3. Refusals to Allow Stewards Freely to Take Union Briefcases Out of the Plant	16
4. Other Harassment	18
5. Refusals to Bargain by Frustrating the Operation of the Contract Grievance Machinery	19
a. Outright Refusals to Discuss the Substance of Grievances with Shop Stewards	19
b. Refusals to Call Stewards	21
c. Refusals to Settle Grievances Except in the Absence of Union Stewards; Denial of Information	24
IV. ALLEGED VIOLATIONS SUBSEQUENT TO THE EVENTS AT ISSUE HEREIN	27
V. THE BOARD'S DECISION AND ORDER	29

	Page
ARGUMENT	29
I. HAD THE BOARD PROPERLY APPLIED THE STANDARD IT ERECTED IN THIS CASE TO THE RECORD, IT WOULD HAVE BEEN COMPELLED TO ADJUDICATE AND REMEDY THE UNFAIR LABOR PRACTICES ALLEGED	29
A. The Unfair Labor Practices Alleged Were Simply A Continuation of Aircraft's Adjudicated Pattern of Labor Act Subversion	29
B. The Board's Conclusion That There Is "Positive Evidence of Maturation" Warranting Deferral Is Not Supported On The Record	33
1. The Size of Respondent's Operation and Work Force	33
2. That the Violations Were Committed by Low-Level Supervisors and Plant Security Personnel Does Not Establish a Basis for Dismissing the Instant Complaint	34
3. Compliance with Two Arbitration Awards Does Not Evidence Compliance With Provisions of the Labor Act Enforced by the Board	37
C. The Board Erred In Deferring Because The Evidence Indicates That The Parties' Grievance Machinery Is Not Functioning Fairly And Smoothly	41
II. BY REFUSING TO ADJUDICATE AND REMEDY A SERIES OF ALLEGED LABOR ACT VIOLATIONS BY A STATUTORY RECIDIVIST THE BOARD ABDICATED ITS UNIQUE RESPONSIBILITY TO ENFORCE § 8 OF THE NATIONAL LABOR RELATIONS ACT	46
A. From Collyer to United Aircraft: A Study in "Seductive Plausibility"	46

	Page
B. The Board Erred in Failing to Adjudicate the Allegations Concerning Sullivan and Urbanowicz	59
C. The Collyer Rule is Inconsistent With the Statutory Design	60
CONCLUSION	63
APPENDIX A	A-1

AUTHORITIES CITED

CASES:

<i>Alexander v. Gardner-Denver Company</i> , 415 U.S. 36 (1974)	51, 52, 53, 55, 57, 61, 62
<i>Amalgamated Workers v. Edison Co.</i> , 309 U.S. 261 (1940)	50, 53, 58
<i>American Standard, Inc.</i> , 203 NLRB No. 169, 83 LRRM 1245 (1973)	41, 42
<i>Andrus v. Convoy Co.</i> , 480 F.2d 604 (9 Cir. 1973), cert. denied, 414 U.S. 989	38
<i>Arnold v. Carpenters' District Council</i> , 417 U.S. 12 (1974)	62
<i>Associated Press v. NLRB</i> , 492 F.2d 662 (D.C. Cir. (1974))	62
<i>Bethlehem Steel Co.</i> , 31 Lab. Arb. 423 (1958)	55
<i>Bob Jones University v. Simon</i> , 416 U.S. 725 (1974)	62
<i>Borg Warner Corp.</i> , 9 Lab. Arb. 901 (1948)	42
<i>Carey v. Westinghouse Electric Corp.</i> , 375 U.S. 261 (1964)	60
<i>Cohens v. Virginia</i> , 6 Wheat. (19 U.S.) 264	62
<i>Collyer Insulated Wire</i> , 192 NLRB 837 (1971)	3, 46, 47, 51, 53, 60, 61, 62
<i>Consumers Power Co. v. NLRB</i> , 113 F.2d 38 (6 Cir. 1940)	36
<i>Darby Cadillac</i> , 169 NLRB 315 (1968)	36

	Page
<i>Enterprise Pub. Co. v. NLRB</i> , 493 F.2d 1024 (1 Cir. 1974)	62
<i>Fafnir Bearing Co.</i> , 146 NLRB 1582, enf'd 362 F.2d 716 (2 Cir. 1966)	42
<i>Frankel Associates, Inc.</i> , 146 NLRB 1556 (1964)	36
<i>International Harvester Co.</i> , 22 Lab. Arb. 191 (1954) ..	42
<i>International Tel. & Tel. v. NLRB</i> , 382 F.2d 366 (3 Cir. 1967)	42
<i>International Woodworkers, etc. v. NLRB</i> , 380 F.2d 628 (D.C. Cir. 1967)	54, 60
<i>Labor Board v. Seven-Up Co.</i> , 344 U.S. 344 (1953)	59
<i>Link v. NLRB</i> , 330 F.2d 437 (4 Cir. 1964)	57
<i>Local Lodge 1424, IAM v. NLRB</i> , 362 U.S. 411 (1960) ..	45
<i>Local 715, IBEW v. NLRB</i> , 494 F.2d 1136 (D.C. Cir. 1974)	60
<i>Local Union 2188, IBEW v. NLRB</i> , 494 F.2d 1087 (D.C. Cir. 1974)	62
<i>Lodge 743, Int. Assn of Mach. v. United Aircraft Corp.</i> , 337 F.2d 5 (2 Cir. 1964), cert. denied, 380 U.S. 908.	38
<i>Malrite Corp. of Wisconsin, Inc.</i> , 198 NLRB No. 3, 80 LRRM 1593, reversed in part sub nom, <i>Local 715, IBEW v. NLRB</i> , 494 F.2d 1136 (D.C. Cir. 1974) ..	37, 47
<i>Marbury v. Madison</i> , 1 Cranch (5 U.S.) 137	62
<i>Mobil Oil Corporation</i> , 196 NLRB 1052, enf't denied, 482 F.2d 842 (7 Cir. 1973)	40
<i>Nabisco, Inc. v. NLRB</i> , 479 F.2d 770 (2 Cir. 1973)	62
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1967) ...	19, 42, 43, 44, 56
<i>NLRB v. C & C Plywood</i> , 385 U.S. 421 (1967) ..	45, 56, 60
<i>NLRB v. Crown Laundry & Dry Cleaners, Inc.</i> , 437 F.2d 290 (5 Cir. 1971)	37
<i>NLRB v. Local 138, Operating Engineers</i> , 71 LRRM 2335, — F.2d — (2 Cir. 1969)	57
<i>NLRB v. Marcus Trucking Co.</i> , 286 F.2d 583 (2 Cir. 1961)	59
<i>NLRB v. Marine Workers</i> , 391 U.S. 418 (1968)	45

Index Continued

v

	Page
<i>NLRB v. Mylan-Sparta Co.</i> , 166 F.2d 485 (6 Cir. 1948) .	36
<i>NLRB v. Perkins Mach. Co.</i> , 326 F.2d 488 (1 Cir. 1964) .	42
<i>NLRB v. Rutter-Rex Mfg. Co.</i> , 396 U.S. 258 (1969) . . .	54
<i>NLRB v. United Aircraft Corp.</i> , 199 NLRB 658, enf'd 490 F.2d 1105 (2 Cir. 1973)	6, 7
<i>NLRB v. Strong</i> , 393 U.S. 357 (1969)	54, 60
<i>Nat. Licorice Co. v. Labor Board</i> , 309 U.S. 350 (1940) .	51, 54, 60
<i>National Radio Co.</i> , 198 NLRB No. 1, 80 LRRM 1718 (1972)	4, 32, 40, 47, 48, 49, 51, 54
<i>North Am. Av., Inc.</i> , 19 Lab. Arb. 385 (1952)	42
<i>Porter, H. K. Co. v. NLRB</i> , 397 U.S. 99 (1970)	40
<i>Pratt & Whitney Division, United Aircraft Corp.</i> , 133 NLRB 158, enf'd 310 F.2d 676 (5 Cir. 1962)	7
<i>Provision House Workers Union v. NLRB</i> , 493 F.2d 1249 (9 Cir. 1974)	58, 62
<i>Quality Mfg. Co.</i> , 195 NLRB 197, enf't denied in rele- vant part, 481 F.2d 1018 (4 Cir. 1973), rev'd, 43 L.W. 4282	22, 31, 40
<i>Rowland Tompkins & Son</i> , 35 Lab. Arb. 154 (1960) . . .	55
<i>Schlitz Brewing Co.</i> , 175 NLRB 141 (1969)	54
<i>Smith v. Evening News</i> , 371 U.S. 195 (1962)	60
<i>Spartan Mills</i> , 27 Lab. Arb. 256 (1956)	42, 55
<i>Stevens, J. P. & Co. v. NLRB</i> , 380 F.2d 292 (2 Cir. 1967), cert. denied, 389 U.S. 1005	6
<i>Tide Water Associated Oil Co.</i> , 85 NLRB 1096 (1949) .	42
<i>Timken Roller Bearing Co. v. NLRB</i> , 325 F.2d 746 (6 Cir. 1963)	42
<i>United Aircraft Corp.</i> , 1 NLRB 236 (1936)	7
<i>United Aircraft Corp.</i> , 67 NLRB 594 (1946)	7
<i>United Aircraft Corp.</i> , 179 NLRB 935 (1969) . . .	3, 5, 6, 31
<i>United Aircraft Corp.</i> , 180 NLRB 278 (1969), enf'd 440 F.2d 85 (2 Cir. 1971) . . .	5, 6, 31, 34, 37, 38, 39, 54, 57
<i>United Aircraft Corp.</i> , 181 NLRB 392 (1970), enf'd 434 F.2d 1198 (2 Cir. 1970)	6, 7

	Page
<i>United Aircraft Corp.</i> , 188 NLRB 633 (1971)	3, 5, 30, 31, 48
<i>United Aircraft Corp., Pratt & Whitney & Hamilton Standards Divisions</i> , 1-CA-609, 610	7
<i>United Aircraft Corp. v. Canel Lodge 700, IAM</i> , 77 LRRM 3167 (D. Conn. 1971)	39
<i>United Aircraft Corp. v. Canel Lodge 700, IAM</i> , 314 F. Supp. 371 (D. Conn. 1970), aff'd 436 F.2d 1 (2 Cir. 1970), cert. denied, 402 U.S. 908 (1971)	39
<i>United Aircraft v. Lodge 743, IAM</i> , 77 LRRM 3136 (D. Conn. 1971)	39
<i>United Aircraft Corp. v. NLRB</i> , 440 F.2d 85 (2 Cir. 1971)	4
<i>UAW v. NLRB</i> , 427 F.2d 1330 (6 Cir. 1970)	54, 60
<i>United States v. 12 200-Ft. Reels</i> , 413 U.S. 123 (1973)	46
<i>United Steelworkers v. Warrior & Gulf Co.</i> , 363 U.S. 574 (1960)	40
<i>United Steelworkers v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593 (1960)	38
<i>Universal Camera Corp. v. Labor Board</i> , 340 U.S. 474 (1951)	33

STATUTES:

29 U.S.C. § 157	50
29 U.S.C. § 158	50
29 U.S.C. § 160(a)	60
29 U.S.C. § 160(c)	53, 63
42 U.S.C. §§ 2000e et seq.	51

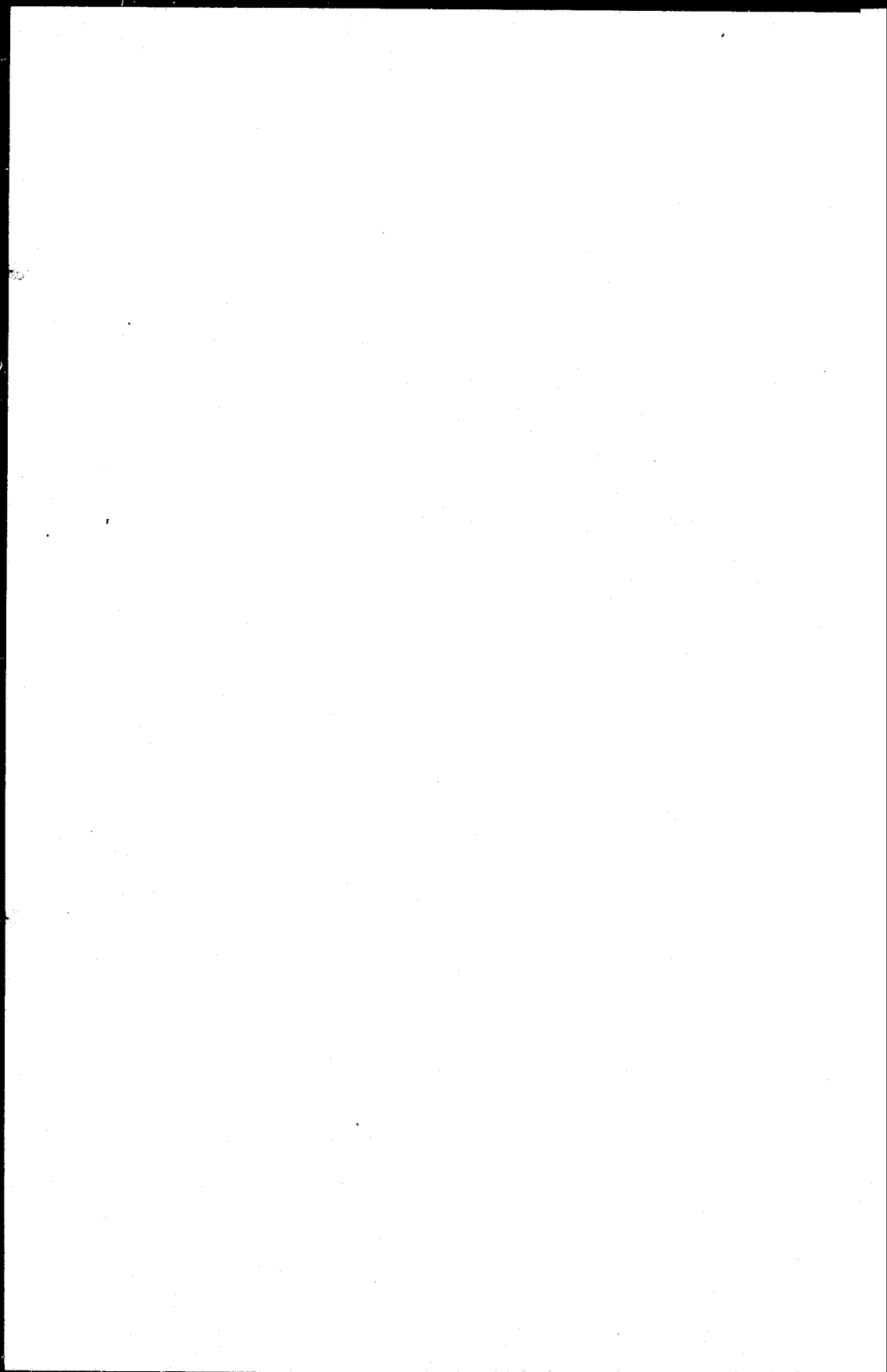
MISCELLANEOUS:

Bureau of National Affairs, Labor Relations Cumula- tive Digest Index Key No. 52.2738 (1973)(1972) (1971)(1966-1970)(1960-1965)	40
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Index Continued

vii

	Page
Comment, The NLRB and Deference To Arbitration, 77 Yale L.J. 1191 (1968)	44
Comment, NLRB Deferral Under Collyer, 53 B.U.L. Rev. 711 (1973)	51
Feller, A General Theory of the Collective Bargaining Agreement, 61 Calif. L. Rev. 663 (1973)	37
Getman, Can Collyer and Gardner-Denver Co-Exist? 43 Ind. L.J. 285 (1974)	51, 57
Getman, Collyer Insulated Wire: A Case of Misplaced Modesty, 49 Ind. L.J. 57 (1973)	56
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O'Connel, Should the Scope of Arbitration be Restruc- tured in Proceedings of Eighteenth Annual Meet- ing, National Academy of Arbitrators 102 (D. Jones Ed. 1965)	55
S. Rep. No. 46, p. 3, Senate Committee on Industrial Espionage, 75th Cong. 2d Sess. pp. 67-69 (1937)	7
Seitz, Limits of Arbitration, 88 Monthly Labor Review, 763 (1965)	55
H. Conf. Rep. No. 510, 80th Cong. 1st Sess. 52	61
H.R. Rep. No. 972, 74th Cong. 1st Sess., p. 21	53



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BRIEF FOR PETITIONERS

STATEMENT OF THE ISSUES

1. Whether, in light of established legal principles, substantial evidence supports the Board's factual conclusions that the unfair labor practices in issue were not a continuation of the employer's prior, adjudicated pattern of violation of the Act; that the parties' collective bargaining relationship has "matured"; and that the parties' grievance machinery is functioning "fairly and smoothly".

2. Whether the Board's refusal to adjudicate and remedy alleged continuing statutory violations by a recidivist employer constitutes an erroneous abdication of the Board's responsibilities to effectuate the policies of the Act.

STATEMENT OF THE CASE

I. INTRODUCTION

This case is before the Court upon the Petition of the Charging Parties, International Association of Machinists, AFL-CIO, Lodges 700, 743, and 1746 (hereinafter "Unions"), to review the order of the National Labor Relations Board (hereinafter "Board"), dismissing the complaints in *United Aircraft Corporation (Pratt & Whitney Division), et al.*, 204 NLRB No. 133 (decided July 10, 1973).¹

The complaints alleged that United Aircraft Corporation (hereinafter "Company" or "Aircraft") harassed and discriminated against employee Union officials in violation of §§ 8(a)(1) and (3) of the National Labor Relations Act (hereinafter "Act") and violated § 8(a)(5) of the Act by refusing to supply information necessary to process grievances and by refusing to deal with union stewards, in order to undermine the Unions' representative status (J.A. 796). The Examiner (now Administrative Law Judge), sustained most of the allegations of the complaint and recommended certain remedies (J.A. 817-818). But a majority of the Board, over the vigorous dissent of members Fanning and Jenkins, declined to adjudicate the issues raised in the complaint, and ordered it dismissed. Because of "the Company's compliance with two arbitration

¹ The Board's decision and order are printed at pp. 841-856 of the Joint Appendix (hereinafter "J.A.").

Throughout this brief, record citations preceding a semi-colon refer to the Board's Decision and Order; references following a semi-colon are to supporting portions of the pleadings, transcript and exhibits.

awards," which the Board treated as positive evidence of maturation of the collective bargaining relationship, and "the Board's limited resources" (J.A. 846-848), the Board was "willing to proceed on the assumption" that the parties would "voluntarily resolve them [i.e., the disputes alleged in the complaint]" through the grievance and arbitration machinery provided in their contract (J.A. 847-848). Accordingly, purportedly following its decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board dismissed the complaint, but retained jurisdiction "solely for the purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness . . . either been resolved by amicable settlement in the grievance procedure or submitted promptly the arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act." (J.A. 848-849.) The Board declined to adjudicate even the two unfair labor practice charges based on matters which had already been arbitrated, as to which the General Counsel and the Charging Party urged that the arbitration remedy did not suffice to effectuate the policy of the Act.

The dissenters pointed out that the Board had only shortly before found that Aircraft "demonstrated hostility towards unionism and proclivity towards violating the Act," J.A. 850, quoting *United Aircraft Corp.*, 179 NLRB 935, 937 (1969) (hereinafter "*Weil*");² see also *United Aircraft Corp.*, 188 NLRB 633 (1971) (hereinafter "*Sherman*"); that this Court had found that Aircraft's many unfair labor practices "follow a general pattern of anti-union hostility and discriminatory conduct[,"]

² It would be convenient to refer to the various cases in which the company has been charged with and found guilty of unfair labor practices as *United Aircraft I*, *United Aircraft II*, etc. But we can no longer keep count. Accordingly, we refer to each of these cases by the name of the Trial Examiner (Administrative Law Judge) before whom the case was tried.

United Aircraft Corp. v. N.L.R.B., 440 F.2d 85, 100 (2d Cir. 1971)" (J.A. 850); and that the facts of the case at bar "may fairly be said to be simply a continuation" of Aircraft's prior unlawful conduct, especially its harassment of union stewards (J.A. 851, 852). The dissenters added that one of the practices attacked in the complaint (and held unlawful by the Examiner)—the refusal to supply information necessary to processing grievances—"strikes at the heart of the [grievance and arbitration] process" (J.A. 853) to which the Board relegated these disputes and that the decision "to subcontract to private hands the determination"³ of that issue, would "preclude a quick vindication of employee rights . . .", by requiring first that the substantive grievance be processed to the point where information is denied, then the processing through arbitration of a separate grievance over the denial of information, and then a resumption of the first grievance (J.A. 855). Finally, the dissenters pointed out that the majority had refused to decide issues which "none of the parties contend are subject to the mandatory arbitration provisions in the contract" (J.A. 855, 856). The dissenters concluded (J.A. 856):

"The majority simply glosses over these items by saying that the jurisdiction of the arbitration is for the arbitrator to decide. The effect is to compel the Union to go through the expense and effort of arbitration so as to obtain the rejection on jurisdictional grounds, which it is certain to obtain, and then to bring the matter back to the Board for resolution. The net effect is likely to be a decision by the Union and/or grievants that the whole matter is not worth the trouble. The result is a complete frustration of employee rights. The result is indefensible."

In the remainder of the Statement, we shall set forth the facts (including certain of the facts found in prior proceedings) upon which the Board's order is based.

³ *National Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718, 1724, 1725 (1972) (dissenting opinion).

II. UNITED AIRCRAFT'S HISTORY OF UNFAIR LABOR PRACTICES

United Aircraft's sorry history of defiance of the National Labor Relations Act is spread across the pages of the reported decisions of both the Board and this Court. Thus, knowing that stewards are the key to effective, day-to-day collective representation of employees, as well as the most important visible evidence that the union is actively serving employee interests, the Company embarked on a campaign, reminiscent of a by-gone era, to intimidate and harass the stewards. Aircraft threatened them with retaliation for engaging in union activity, discharged and otherwise disciplined them upon trumped-up⁴ or trivial⁵ charges of violating Company rules forbidding the solicitation of union membership during working hours, and subjected them to protracted investigations, which included threats, and solitary interrogations by teams of Company security officers⁶ under the guise of enforcing rules prohibiting union solicitation, but "... actually . . . for the purpose of harassing the union stewards involved, making them realize their union activities were being watched closely by the [Company]. . . . , and to garner enough evidence to support subsequent discharges." *United Aircraft Corp.*, 179 NLRB 935, 937 (1969) ("*Weil*"), enforced together with *United Aircraft Corp.*, 180 NLRB 278 (1969) (hereinafter "*Peterson*"), in *NLRB v. United Aircraft Corp.*, 440 F.2d 85 (2 Cir. 1971) (hereinafter "*Weil-Peterson*"). For a case involving similar Aircraft misconduct, see *United Aircraft Corp.*, 188 NLRB 633 (1971) ("*Sherman*").

⁴ *NLRB v. United Aircraft Corp.*, *supra*, 440 F. 2d 85, 90-91 (2d Cir. 1971). The Company falsified statements of employees to build cases against union stewards. *Ibid*.

⁵ *NLRB v. United Aircraft Corp.*, *supra*, 440 F.2d at 91. In *United Aircraft Corp.*, 188 NLRB 633 (1971), the Company unlawfully suspended a steward because another employee handed him a union authorization and check-off card on company time. "The entire incident lasted one minute." *Id.* 634, n. 3.

⁶ *E.g.*, 180 NLRB at 280, 282.

As part of its draconian enforcement of its no-solicitation rule, the Company seized and confiscated union membership and dues authorization cards, and conducted a sweeping "investigation" of a union steward when one of the employees in his department complained that the foreman had discriminated against the employee. *Weil, supra*, 179 NLRB at 936. Citing *J. P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2 Cir. 1967), *cert. denied*, 389 U.S. 1005, this Court enforced the Board's unusually broad order on the ground that "... the many unfair labor practices follow a general pattern of anti-union hostility and discriminatory conduct." 440 F.2d 100.

Not content with intimidating union stewards, the Company sought to cut off communication between the unions and the employees whom the unions represent by refusing, contrary to law, to provide their names and addresses. Many of the employees were non-members whose homes were widely dispersed among the communities surrounding Aircraft's plants.⁷ The Board found and this Court agreed that the Company's refusal violated the Act, *United Aircraft Corp.*, 181 NLRB 892 (1970), *enforced*, 434 F.2d 1198 (2 Cir. 1970).

Continuing its pattern of anti-union conduct, when a group of Aircraft's employees chose one of the unions to represent them at another Connecticut plant, Aircraft denied them a previously promised wage increase. *NLRB v. United Aircraft Corp.*, 490 F.2d 1105 (2 Cir. 1973), *enforcing* 199 NLRB 658. "It is difficult to imagine," this Court wrote in that case, "discriminatory conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities than the refusal to put a scheduled wage increase into effect because the

⁷ The Company, of course, never acceded to the Unions' demands for a "union shop" clause.

employees, four days before, selected a union as their bargaining representative." 490 F.2d at 1109-1110.⁸

III. THE VIOLATIONS ALLEGED IN THE INSTANT PROCEEDING⁹

A. Coercive Interrogation and Harassment of Union Supporters and Stewards

1. *The Suspension and Interrogation of Sullivan*

Robert F. Sullivan, a skilled welder, has been employed by respondent for 11 years (J.A. 66). He was known to be an active supporter and past officer of Lodge 743 (J.A. 66). After his term of office expired, he continued his union activity.

On June 30, 1970, Electron Beam area employee Carlone approached Sullivan during working hours and asked him for his latest merit rating.¹⁰ (J.A. 66-67.) Sullivan replied that he had the forms (including Carlone's) locked in his tool box, but added that:

⁸ The recent adjudicated cases wherein Aircraft was held to have violated the Act are collected in the dissenting opinion below, (J.A. 851). The collection omits 181 NLRB 892, *enforced* 474 F.2d 1198 (2 Cir. 1971), discussed in text. There were earlier cases, as well. *Pratt & Whitney Div.*, 133 NLRB 158 (citing another, settled, case at 159-160, 167), *enforced*, 310 F.2d 676 (5 Cir. 1962) (discriminatory refusal to hire former employee for testifying in Board proceeding); *United Aircraft Corp., Pratt & Whitney & Hamilton Standard Divisions*, 1-CA 609, 610, settlement agreement approved, June 13, 1950; *United Aircraft Corp.*, 67 NLRB 594; *United Aircraft Corp.*, 1 NLRB 236. See also S. Rep. No. 46, p. 3, Senate Committee on Industrial Espionage, 75th Cong. 2d Sess. 1937, pp. 67-69 (La Follette Committee) (anti-union spy activities at Pratt & Whitney).

⁹ In reaching its decision to delegate the issues in this proceeding to the parties for "handling under [their] . . . contractual procedures" (J.A. 848), the Board reviewed "the nature and scope of the acts currently alleged," the conduct here complained of, i.e., "the present allegations of misconduct. . . ." (J.A. 843, 844). Nevertheless, the facts set out below are based upon testimony or documents in the record, not mere allegations. We have omitted as redundant some of the facts which the General Counsel presented.

¹⁰ Respondent supplies the union with xeroxed copies of the semi-annual merit ratings of all bargaining unit employees.

"... I can't give them to you during working hours; I'll either give them to you in the morning before work or tomorrow at lunch." (J.A. 67.)

The two agreed that Carlone would distribute the merit ratings to the other employees in the Electron Beam Area (J.A. 67).

The next day, Sullivan punched in around seven twenty-five, opened his tool box and noticed the merit rating sheets. Just then, Sullivan observed another Electron Beam Area employee, Fiochetta, passing by. Sullivan called out to him and asked him to take the rating sheets back to the area (J.A. 68). Just as Fiochetta took the forms from Sullivan (J.A. 68, 79). Foreman Dolinski (Sullivan's supervisor), "... came running down the aisle" and said "there'll be none of that during working hours." (J.A. 68-69.) Sullivan had not yet heard the buzzer announcing the start of the first shift at 7:30 a.m. and believed that he had begun his conversation with Fiochetta, which lasted "maybe one or two minutes" "before 7:30 a.m." (J.A. 69.) When Foreman Dolinski spoke to the two men, Sullivan glanced at the clock and "noticed it was after 7:30" (J.A. 69). He uttered one word, "whoops!" and immediately went to work in his welding booth (J.A. 69).

Fiochetta, who had kept the merit ratings, returned to his department (J.A. 70). Dolinski followed (J.A. 70). When Fiochetta arrived in the Electron Beam Area, he called over Carlone and another employee, and handed the forms to Carlone. When Foreman Dolinski arrived, the three employees were standing around discussing the merit ratings. Dolinski asked Carlone, "what have you got there?", grabbed the sheets, and left the department. Dolinski said *nothing* to the three employees about passing out merit ratings during working hours or about their being away from their machines (J.A. 89-90, 92).

The next day (July 2), at about 10:00 a.m., Foreman Dolinski told Sullivan he would have to go down to the

plant security offices concerning "a violation of Company rules," and escorted him to the security office (J.A. 71). There Sullivan was introduced to security officer Porter who took him to an office for questioning (J.A. 71).

At the outset, Porter announced he wanted to question Sullivan about "... the passing out of unauthorized literature," which Porter defined in response to Sullivan's inquiry as "... anything that is being passed out in the plant without the knowledge and consent of the Company." (J.A. 71.) Porter showed Sullivan the confiscated merit ratings. Sullivan testified that he told Porter:

"A: Well, I said, oh, them; I didn't know they were unauthorized literature.¹² I told him, yes, I did pass them out. And I told them, then I told him my story on how before 7:30 I started all this; and as far as I'm concerned everything did happen before 7:30, until the time Dolinski came down. I told him I didn't hear the buzzer or anything. I told him that if I had heard the buzzer, I would definitely have stopped, because I do have a strict rule myself. I've passed these out many of times, and I never passed them out during working hours.

"Q: Did you tell him that?

"A: Yes, I did. And he was taking notes, and he went on to say well how did I get them. At that time I told him, I don't know how I got them. He asked me, did they come from the union? I told him, I don't know. He said, well, who gave them to you; did someone from the union give them to you? I told him, I don't know." (J.A. 72.)

The investigator focused the questioning upon Sullivan's union affiliation (J.A. 75):

"Q: Did he ask you if you were still active for the union?

"A: Yes, he did.

¹² The merit rating form (J.A. 535) is an official Company document.

"Q: Would you describe that?

"A: Well, I told him, no, I was not active with the union Well then he said, well how come you have these things if you're not active with the union. And I just told him, I don't know, I just have them. And that's the way it went."¹³

Sullivan became more and more nervous and upset at the questioning and at being in the security offices for the first time (J.A. 73-74, 87, 333).

Porter then prepared a statement based on the notes he had taken. After he had finished, Porter read the written statement to Sullivan. It did not contain Sullivan's assertion that he had not intentionally passed the ratings out after 7:30; that he had not heard the buzzer; that he had a strict policy not to do such things during working hours; and that he had told this to employees on a number of occasions when they had asked him for their merit ratings during working hours (J.A. 73, 80, 81, 84). Sullivan tried unsuccessfully to get Porter to correct the statement (J.A. 75-76, 678-679). Upset, Sullivan signed the inaccurate, inculpatory document, nonetheless. *Ibid.*

Sullivan had been detained at the security offices for about one hour (J.A. 76).

Fiochetta was also interrogated on July 2. After Fiochetta returned, shaken, from the plant security offices, Carlone discussed the matter with him. Carlone testified.

"He said he came back from plant security, and he was nervous and he said they had caught him with the sheets, the merit rating sheets. And it was then that I said, well, gee, I had asked for them, not you. And a little while later—I don't remember the time, it was just before lunch—I went to Mr. Dolinski, who was the foreman at the time; I said, Ed, I was the fellow who asked for the sheets. He said, well, that's not really

¹³ The Administrative Law Judge credited Sullivan on this point (J.A. 805).

that important; the important thing is that the guy was passing them out on company time. And he let it go at that." (Emphasis supplied.) (J.A. 89-90.)

Carlone was never questioned by the Internal Security Investigators (J.A. 90). But Fiochetta and Sullivan were coerced by the questioning to disclaim or minimize their union activity and allegiance. See G. C. Exh. 64(C-1), p. 3, paras. 2 & 3 (J.A. 677).

On July 7, Sullivan was called to the General Foreman's office and suspended for three days for passing out unauthorized literature (J.A. 78). He was instructed to turn in his badge, leave the plant and return to work on July 10, 1970. Employees who work in Sullivan's area under the same general foreman (Russell Galuska) and foreman (Edward Dolinski) are regularly permitted to distribute non-work related literature and participate in non-work related discussions during working hours (J.A. 79).¹⁴ Other employees have also failed to hear the starting buzzers and to begin work on time but have not been disciplined (J.A. 81-82, 92). Fiochetta and Carlone, the Company decided, were "not guilty," although clearly they had knowingly distributed, received and examined their merit ratings away from their machines on Company time (J.A. 672-673, 331-332). See also G. C. Exh. 64(D-1), p. 2 (J.A. 681).

The Company stoutly resisted Union efforts to set aside Sullivan's suspension. Eventually, an arbitrator found the discipline not to be for "just cause" and thus in violation of the contract, and awarded Sullivan back pay (J.A. 804). The Trial Examiner found that the Sullivan interrogation (which the arbitrator had not passed upon, see R. Exh. 91(a), J.A. 757) violated the Act (J.A. 805), but did not decide whether the suspension did, as a finding on that issue

¹⁴ See also testimony of Russell A. Lee, J.A. 62-63; Carl D. Martin, J.A. 95-96; Carlo Carlone, J.A. 90-91.

"would not add materially to the order in this case" (J.A. 804).

2. *The Interrogation and Suspension of Steward Raymond*

Shop Steward Gary Raymond had frequently been criticized by his foreman, Herbert Heim, for spending too much time in handling grievances (J.A. 801; 189-190). (See also J.A. 276-278). Often, Heim peremptorily interrupted Raymond's casual conversations, and, as Heim admitted, kept notes on how Raymond spent his time, something he could not specifically remember doing with respect to any other employee during the period in question (J.A. 188-189, 268-271, 273-274, 275-276). Other employees were told by the group supervisor not to talk to Raymond because he was the shop steward (J.A. 189).

On September 24, 1970, Heim gave Raymond his disposition of a grievance Raymond had filed on behalf of an employee who objected to being surreptitiously timed by Heim in the performance of his work. Raymond testified (J.A. 193):

"He called me to his desk. And upon approaching his desk he said that he wanted to give me a disposition. I gave him my copy and he put it under his copies. And he had a pencil in his hand. He held it up, and he said to me, now, I want to tell you just one thing, I'm going to run this line any way, shape, or form in which I see fit, and its none of your business how I run this line."

Raymond replied that he wasn't interested in how the foreman ran his line—it wasn't his business—what was his business was how to represent Perry (the complaining employee) and present his complaints against Heim (J.A. 193).¹⁵ Heim admitted that after he had given Raymond

¹⁵ On cross-examination Heim admitted that he had in fact timed Perry (J.A. 279) and discussed his timing of the employee with Group Supervisor Worski (J.A. 279). He told Raymond at first he had only "observed" Perry's work (J.A. 279).

his disposition and before he gave the steward his union time card to punch back into work, he set Raymond straight on his (Heim's) prerogatives and how he expected the steward to react to them on similar grievances which questioned his authority (J.A. 288-290). Raymond filed a second grievance against Heim for failing to discuss and to attempt to resolve the grievance (J.A. 665-667).

A week later, on the morning of October 1, 1970, Raymond approached Heim and asked for his merit rating. Heim told him the new merit ratings had not yet been released so Raymond couldn't have his (J.A. 194). Raymond renewed his request, explaining that he hadn't received the merit rating, and asked for the current one as well (J.A. 194). That afternoon, Heim approached Raymond at his machine and told him to report to his desk (J.A. 194). There, Heim showed Raymond a piece of paper with his new merit rating code written on it—"9/28/70; HIFIG" and insisted that Raymond copy the information from the scrap paper (J.A. 195). Later Raymond asked Heim about the standards and records used in reaching the rating (J.A. 195-196). Since Heim appeared to be getting irritated, Raymond told Heim he wanted to grieve the matter, said he'd like a steward, i.e., himself. Heim said sarcastically "You mean you're going to represent yourself." (J.A. 196-197.)

Subsequently, Heim told Raymond to "punch out" on union business.¹⁶ When Raymond approached Heim, Raymond observed that Heim was very upset. Rather than discuss the issue under those conditions, Raymond asked Heim for a grievance form which Raymond then proceeded to fill out. After he had completed the form Raymond tried to ask Heim for his previous merit rating for comparison; but Heim kept interrupting (J.A. 197-199). Then as the steward testified (J.A. 199):

¹⁶ Under the parties' agreement, stewards may devote a limited amount of paid time to representing grievants, and the Company requires that they record that time by "punching" special time cards which are kept by foremen. See G. C. Exh. 6(A); J.A. 280.

"And he started shaking that pencil at me. All of a sudden he started telling me I wasn't acting in a manner becoming of a steward. So I—and he really was getting upset. So I told him, well, Herbie, you're not acting like a foreman. And this really set him off because he came at me with that pencil. He stuck it right in my face [i.e., three to four inches away from the area between the steward's nose and mouth (J.A. 200)]. And I instinctively hit at it, knocked it out his hand. It went on the floor.

"He slapped the desk hard with his hand. 'I order you back to work.' At that time, I reminded him, 'Mr. Heim I'm on union time, you know.' And there was a pause there. He made no attempt at all to give me the [time] cards, at that time, so I could go back to work."

Seeing the turn matters had taken, Raymond tried to terminate the conversation by asking Heim to sign the grievance form (thus officially filing the grievance (J.A. 284-285)) and to return Raymond's union time card so he could go back to work. But Heim continued his tirade (J.A. 199). Eventually, after calling Personnel at Raymond's suggestion, Heim initialed the grievance form, gave Raymond back his time card and warned him that "... you haven't heard the last of this yet." (J.A. 200.)

The next day, Lionel Labbe, an employee under Heim's supervision, was called to the Internal Security Office for questioning by two interrogators (J.A. 207). When he refused to answer questions without the assistance of a steward, Labbe was sent to the Personnel Department and questioned by two Personnel Advisors who threatened that they would "walk . . . [him] out the door now" if he did not answer the investigators' questions (J.A. 208-209). Labbe yielded to the threat and was escorted by his General Foreman back to Internal Security where he answered all questions and gave the interrogators a signed statement (*ibid.*, J.A. 644-645).¹⁷ Ten other employees were ques-

¹⁷ The interrogators insisted upon including in the statement a representation that no threats were made to Labbe, despite Labbe's protest that that was not true (J.A. 209).

tioned as well, Raymond knew, and, that same afternoon, he withdrew his grievance (J.A. 632-663, 200).

Early in the morning of October 5, 1970, Raymond was called to the Internal Security Office and interrogated by two security officers for four hours (J.A. 803; 668). He told the interrogators at the outset that he wanted a steward to be present, but that since Labbe had been threatened with discharge for asking for a steward, he (Raymond) would cooperate. The investigators did not correct Raymond's impression that insistence upon union representation would lead to reprisal (J.A. 803; 201). After the questioning had gone on for some time, the investigators confronted Raymond with a typewritten affidavit which recited, *inter alia*, that he was present at Internal Security "of my own free will and accord without fear, threat, or promise of favor." (J.A. 648.) Raymond told the investigators that he didn't think that statement was correct, but they insisted that it could not be changed.

Raymond signed the statement (J.A. 202). "... [R]ight away the atmosphere in the room changed . . . [T]he two men became very rough, very, almost like you see on television." (J.A. 202.) Raymond testified (J.A. 202-203):

"They took the company rule book out, and he put it on the desk. And he started reading he statements, and he said, 'you knew this was true, didn't you?' I told him 'yes, I know what the company rule book is. I even take it out on grievances when I go. Many, many cases, come up when I can resolve a grievance with this. And, anyhow, they sent me back to work, and after I returned to work, I went to lunch which was about 12:00.' "

About three hours later, Raymond was told by his General Foreman and foreman that he was suspended for two weeks for "insubordination." The foreman "walked [Raymond] . . . out" of the plant, past the grinning faces of Raymond's General Foreman and another General Fore-

man (J.A. 203-204).¹⁸ Wilfred Hall, the Assistant Personnel Manager at the four large and several smaller Connecticut plants of the Company's Pratt & Whitney Division, recommended the suspension to the "manufacturing manager." The incident was reported to the Company's Industrial Relations Director (J.A. 34, 51, 431-432).

On October 6, 1970, Raymond filed a grievance protesting his suspension. The Personnel Department instructed Heim not to discuss the matter with the steward (Misho) who presented the grievance. Heim followed these instructions (J.A. 669-670).

The Examiner found that Raymond's suspension for alleged misconduct in the processing of his grievance and the investigator's failure to assure him that there would be no reprisals if he insisted upon the presence of a steward during his interrogation violated the Act (J.A. 803).

3. Refusals To Allow Stewards Freely To Take Union Briefcases Out of the Plant

On April 3, 1974, Foreman Howard Lyman and General Foreman Foster wrongly told Shop Steward William Gaskins that he could not pass out merit ratings he had obtained at the union hall to other employees on his lunch hour as part of his job as a Steward. Upon Gaskins' protest, Lyman told him to "go back to the union and learn the Company rules." A few days later Lyman recanted (J.A. 866; 170-171).

On April 23, a guard, acting under instructions from Personnel, prevented Gaskins from leaving the plant with his union briefcase in which, as Gaskins had told Lyman, he

¹⁸ The Company successfully persuaded the Administrative Law Judge on grounds of relevancy narrowly to circumscribe inquiry by the General Counsel and counsel for the charging party into the role played and the instructions given by higher level Company officials in the Raymond investigation and disciplinary suspension (J.A. 300-301, 302-303, 306-307, 308-310, 436. See also J.A. 311, 313).

carried merit ratings, and other documents, such as check-off authorizations, copies of the contract, and membership applications, relating to his function as a steward (J.A. 172).¹⁹ The guard insisted that Gaskins would have to have a pass. Previously, Gaskins and other union stewards had been permitted to take union briefcases in and out of the plant upon submitting to an occasional "sight inspection" (J.A. 140-141, 162, 172, 149-151, 424-425). Gaskins was compelled to leave the briefcase in his locker (J.A. 172).

The next day, when Gaskins asked Lyman for a pass, the latter refused because he had "got [ten] orders from personnel not to issue a pass to take out the union briefcase . . . unless it is necessary." (J.A. 173.) Lyman explained that it would be necessary to issue a pass if Gaskins went to a grievance meeting at the second step. (J.A. 800; 173.) Upon Gaskins' filing and processing of a grievance, Company officials took the position that it would not issue a pass on a daily basis because there was no written agreement obligating it to do so, and refused to explain why the prior practice had been abandoned (J.A. 163, 579). Thereafter, passes were issued only when Gaskins had to attend grievance proceedings (J.A. 800).

The new Company policy of requiring but denying passes to authorize stewards to bring union briefcases in and out of the plants was also imposed on Shop Steward and Union Vice President Dennis Havener. Havener's foreman, Luke Robinson, explained that he felt it was unnecessary for Havener to take his briefcase with him every day, and that a pass would be issued in connection with grievance presentations (J.A. 801; 142-144). Upon instructions from Personnel, Robinson refused to give Havener a daily pass (J.A. 423. See also J.A. 420-423, 425-427).

¹⁹ Union briefcases are plastic, envelope type-containers, approximately eight inches by ten inches, marked by union insignia. They are used by all stewards and officers (J.A. 141-142).

The Examiner found that the "Company has advanced no reason why Lyman should not have issued passes to Gaskins to take his union briefcase out of the plant after an inspection of its contents." (J.A. 800.) He concluded that Lyman's and Robinson's refusals to issue daily passes to stewards violated the Act (J.A. 800, 801). The record is devoid of any innocent explanation of the April 23 policy change, or of the refusals, on instructions from Personnel, (e.g., J.A. 415-416) to issue daily passes to the stewards, or of the refusal to issue stewards passes of longer duration. Monthly passes were issued, the record shows, to Company trainees who had occasion regularly to bring written materials in and out of the plants (J.A. 357). Passes were not required of female employees who carried pocketbooks in and out of the plant without inspection (J.A. 162).

4. *Other Harassment*

The complaint alleged and the Trial Examiner found other instances of harassment of stewards on account of their union activities. Thus, foreman Lyman repeatedly broke up brief, casual conversations between Gaskins and other employees, invariably castigating Gaskins even if other employees initiated the exchanges. Repeatedly, the foreman warned Gaskins and other employees that a Company rule barred conversations between shop stewards and employees during working hours, and that if Gaskins were observed talking to other employees, he would be suspected of soliciting on behalf of the union (J.A. 166-169). The foreman conceded that he permitted other employees to engage in brief conversations (J.A. 799-899).

The Examiner also found that five days after Russell Lee was elected shop steward, his foreman told him that as a steward, management would look upon him differently and he would be expected, on pain of discipline, to follow the contract "100 percent." (J.A. 804.) Lee, the foreman said, would be expected to follow designated aisles when

walking to the men's room or the cafeteria and, as a steward, would be dealt with more harshly than anyone else if he broke Company rules (J.A. 804). The Examiner, however, rejected the General Counsel's contention that numerous other instances of harassment alleged in the complaint violated the Act. The facts established at trial with respect to these allegations are set forth in detail in the General Counsel's Brief to the Examiner which we have lodged with the Court.

5. *Refusals to Bargain by Frustrating the Operation of the Contract Grievance Machinery*

The record before the Board in this case contains "allegations" of facts establishing that Company officials and foremen, the latter under instructions from the Personnel Department, engaged in conduct which had the effect of sabotaging the grievance machinery by refusing to deal with union stewards, by denying the union "sufficient information to permit it to evaluate the merits of potential grievances" (J.A. 814, n. 14, citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432), and by refusing, as a matter of policy, to change its position as a result of grievance meetings at steps 2 and 3 at all and at step 1, except in a meeting wherein no union representative participated.²⁰

a. OUTRIGHT REFUSALS TO DISCUSS THE SUBSTANCE OF GRIEVANCES WITH SHOP STEWARDS

Laced through this voluminous record are numerous instances in which foremen simply refused to deal with shop stewards. For example, on June 17, 1970, Conrad Tyaack, a toolmaker class B, asked his foreman, Anthony Bankowski, whether the "R" merit rating he had received the night before was "correct" and meant he would not get a raise. Receiving affirmative answers to both questions, and

²⁰ The contracts provide for a four-step grievance machinery, and for arbitration of certain enumerated issues. See J.A. 511-523, 585-598, 609-621.

because his previous attempts to ascertain the basis of prior merit ratings had proved bootless, Tyaack requested the services of a shop steward (J.A. 8-9). Steward Dennis Havener was called and Tyaack gave Havener the prior history, as he saw it, and asked Havener to tell him whether or not he had sufficient grounds for complaint (J.A. 9). When Havener sought to discuss the rating with foreman Bankowski, Bankowski flatly refused to discuss Tyaack's merit rating because Bankowski ". . . believed that he [Havener] was not qualified to discuss the issues in the tool room" (J.A. 10).²¹ Bankowski added, "if the employee has any problems, he should discuss it [sic] with me. I'm his foreman" (J.A. 152, 394). Havener reminded Bankowski of the employees' right to steward representation (J.A. 152), but Bankowski insisted:

"... that he did not have to discuss Conrad's [Tyaack] merit rating with [the steward] because Conrad had not discussed it with him [i.e., the foreman] first" (J.A. 152).

Thereafter, Bankowski questioned Havener's qualifications to present Tyaack's complaint, and concluded the meeting by stating, "I'm not going to discuss anything with you" (J.A. 152).

Havener filed a formal grievance which led to a "conference" at which Bankowski summarily denied the complaint (J.A. 153). When Havener asked for the basis of Bankowski's decision, the foreman replied, "I don't have to show you anything" (J.A. 153). Bankowski refused to discuss the grievance because, he said, Tyaack had not discussed the merit rating with him first, and "[Havener] . . . knew nothing about toolroom work."²²

²¹ For another instance of a rebuff based on a foreman's view that a steward was unqualified, see J.A. 811; 126.

²² J.A. 809; 153-154. See also J.A. 816 (finding violation of the Act). The Company's defense was that since the foreman believed the steward was not qualified, the foreman had no obligation to discuss the grievance with him (J.A. 155-157). For another example of this approach, see J.A. 811; 126, 399.

Similarly, on October 21, 1970, when William C. Gaskins attempted to process the merit rating grievance (G.C. Exh. 78) of employee Betty Burnett (Department 4151) foreman Howard Lyman told him "... well if Betty Burnett felt like she wasn't rated proper, why didn't she come and talk to me" (J.A. 179). See also J.A. 94-95, 111-112, 178, 686-687, 690-691, 692-693, for other examples of refusals to discuss the substance of controversies with shop stewards.

The refusal to discuss a grievance with a steward unless the employee has discussed it alone with the foreman, conforms, as the record shows, to top management's view that discussion without a union representative present is "the proper procedure" (J.A. 562). Thus, according to the Company's Minutes of a Step 2 grievance meeting between Assistant Personnel Manager John Phelps²³ and shop steward Theodore Tobin, Phelps told Tobin in response to the latter's request for certain records that "the foreman was under no obligation to produce records because there was no discussion about the ratings *between the employee and the foreman . . .*" (J.A. 561 emphasis added). Phelps added that "the union is required to bring forth facts and substantiation and it is difficult to do this when there wasn't a discussion on this subject between the foreman and the employee who *should be the first parties to thrash out any differences* which might exist" and that "when the shop stewards and the employees follow the proper procedure then an intelligent discussion of performances can follow" (J.A. 562, emphasis added). Accord, J.A. 557 (Phelps' minutes of meeting wherein he reiterated Company's position); J.A. 558-559.

b. REFUSALS TO CALL STEWARDS

Given that policy, one would expect—and the record shows—that Company foremen not infrequently refused to

²³ Phelps represented the Company at all Step 2 meetings involving Pratt & Whitney's four Connecticut plants (J.A. 429).

call shop stewards when employees requested one to assist them either in connection with contemplated discipline or a grievance. Thus, in July 1969, employee Michelle Urbanowicz requested that her foreman Ernest Poppalardo, call a shop steward after Poppalardo threatened to discipline her unless she signed a document admitting that she had been absent in violation of Company rules (*i.e.*, AWOL) (J.A. 211).

She testified:

"A: He told me that I had to sign, and I said I wouldn't sign, and I asked him then to see a steward. He said, 'You are not going to see anybody until you sign the book,' and I said that he couldn't do that, that was a Company policy that I have a right to see a Union Steward.

"Then he said, 'I'm acting for the Company, and you are not going to see anybody. Please, sign the book.'

"Q: And what did you say?

"A: Then he said, 'Well, if you are not going to sign, you might as well go home. Get your coat and punch out.' So I got my coat."²⁴

Similarly, Assistant Foreman Louis Kasden called employee Francis E. Rogers into the foreman's office just

²⁴ Aircraft forced the Union to entertain a Company grievance and to arbitrate the Urbanowicz suspension. The Company refused to set that suspension aside, but the arbitrator held it invalid. The quote in the text is from p. 31 of the transcript of Urbanowicz's testimony in the arbitration proceeding. The transcript and award were placed in evidence before the Board as G.C. Exhs. 7B and 7A, respectively (J.A. 533-534).

The arbitrator's ruling was apparently based on his view that had a shop steward been called, he would have advised Urbanowicz to sign the attendance book, and would thus have insulated Urbanowicz from discipline for her refusal. The arbitrator made no finding, of course, as to whether the manner or the fact of imposition of discipline under the circumstances interfered with employees' statutory rights or what remedy would be appropriate if it did (G.C. Exh. 7A, pp. 9-10). Neither did the Board. Compare *Quality Mfg. Co.*, 195 NLRB 197 (decided Jan. 28, 1972), *enforcement denied in relevant part*, 481 F.2d 1018 (4th Cir. 1973), *rev'd*, 43 L.W. 4282.

after Rogers punched into work (J.A. 182-183). Kasden read Rogers an employee report ²⁵ (J.A. 629) which, by its terms, indicated current dissatisfaction with Rogers' performance and that Rogers would be demoted—or so it appeared to Rogers (J.A. 187). Kasden demanded that Rogers sign the report. Rogers replied, “. . . no I wasn't signing anything without the presence of the shop steward” (J.A. 183). The Assistant Foreman told him, “. . . sign first then you will get a shop steward.” Again, the employee refused and requested the services of a steward. About that time, Pearly Robinson, an Assistant Foreman from the second shift, joined Kasden in his attempts to convince the employee to sign the report. Rogers continued to refuse. Then according to Rogers:

“[Robinson] said you're very foolish, Fran, not to sign it . . . but if you don't sign it . . . there'll be a lot of trouble for you; he says, there's only a seven cents difference by being demoted back to labor grade “A” (sic), from [labor grade] seven there's only seven cents difference; he says, I know it's only money . . . but if you don't sign it . . . there's no way in hell you're ever going to get back in labor grade seven.” (J.A. 184).

Rogers repeated to both supervisors that he “wasn't signing anything without a steward” (J.A. 184-185). Kasden then signed the report and Robinson signed as witness to Rogers' refusal. Rogers again requested a shop steward, to no avail ²⁶ (J.A. 185-186). The record shows that foremen are told ordinarily to contact the “Personnel Advisor” before calling a steward (J.A. 552), and to record and “provide [his] . . . supervisor and [Personnel] Ad-

²⁵ An employee report records employee “Action warranting commendation or discipline” (J.A. 815).

²⁶ Throughout the period of approximately 45 minutes that he was in the office, Rogers estimated he asked Assistant Foreman Kasden for a steward “half a dozen times” (J.A. 186). The Examiner found that the refusal to call a steward violated Sections 8(a)(5) and (1) of the Act (J.A. 808).

visor with a full report'' of any interview with a steward (J.A. 553).

C. REFUSALS TO SETTLE GRIEVANCES EXCEPT IN THE ABSENCE OF UNION STEWARDS; DENIAL OF INFORMATION

Aside from engaging in conduct which deprived employees of steward representation in the grievance procedure, the Company, as a matter of policy, refused to settle grievances and withheld information which prevented stewards from evaluating, let alone effectively presenting the substance of employee grievances under the contract.

Thus, Company Vice President Morse testified that Aircraft had never changed any merit rating at Steps 2, 3 or 4 of the grievance procedure, but that instead, if Management's representatives believed that the grievance had merit (as they did in only a "handful" of cases over many years) the grievance was remanded to Step 1 (J.A. 345-346, 353-354). See also J.A. 115 (steward never won a merit rating grievance). At the Step 1 remand, however, the Company consistently *refused* to permit a steward *to be present* (J.A. 430 (Testimony of Asst. Personnel Manager, John Phelps); J.A. 366-367 (Testimony of Lodge 1746 President Sawyer)). In effect, then, the Company as a matter of policy would sustain a grievance only in the *absence* of a union representative and thereby turned steps 2 through 4 of the grievance machinery into a farce.

In addition, the Company precluded effective initial grievance presentation at Step 1 as well. First, the Company insisted as a matter of uniform policy that the union produce specific facts at Steps 1 and 2, which would show error in a challenged rating (which usually covers a six-month period and embodies what the Company asserted were the foremen's subjective evaluations of five performance factors,²⁷ see, *e.g.*, J.A. 810, 813; 174, 358-359, 574

²⁷ The five factors were accuracy, output, use of working time, application of job knowledge, and cooperation. On the subjective character of the rating, see J.A. 35 (testimony of Company Vice President Morse).

(Morse explains policy)). Accord, J.A. 429-430 (Phelps); J.A. 559, 561, 563, 567, 572, 574. See p. 21, *supra*. See also J.A. 812, 813; 372-373, 379-380, 383-385, (Zielinski), 387-388, 389 (Savarese), 395 (Tyaak), 98-399 (Keeney), 419-420 (Robinson). Unless the union representative could produce *prima facie* evidence that the foreman had erred, the Company—as a matter of policy and at all steps of the grievance procedure—turned down union requests to see records in the Company's exclusive possession wherein incidents relating to the employees' performance on which the rating foreman had relied were recorded and refused to disclose any facts on which the foreman based his appraisal. See J.A. 809-813; 568, 569, 100-102, 103-104, 107-108, 138-139, 429-430.²⁸ Even on those occasions when the union happened upon "facts" tending to justify the employee's complaint (in one instance an employee's notebook recording his assignments and performance; in another, the rating foreman's promise, repudiated by another foreman, to re-rate an employee), the Company Step 2 representative refused to reveal the facts or show the union records on which the ratings were based, woodenly repeated his request that the union substantiate the grievance, and then denied it (J.A. 97; R. Exhs. 78(a)-(d); J.A. 100-101, 106-108, 573-578, 128-129, 131-137, 138-139, 565, 566). See also J.A. 811-812.²⁹

The Step 2 meeting on one of these grievances typifies the Company's approach, as it is revealed in this record.

²⁸ In one instance, the Company refused to let the union steward talk to the foremen who had rated seven grievants, but insisted that the steward talk to the employees' present foreman who, as he conceded, could not possibly discuss the substance of the ratings, since he had not made them (J.A. 812; 110-113). "Personnel" had insisted on this approach (J.A. 112).

²⁹ One of these incidents is set forth in detail in the General Counsel's brief to the Trial Examiner, Vol. I, pp. 77-83 (hereinafter "G.C. Br."). Some of the records which foremen relied upon in rating employees, and which the Company refused to allow the union to see are set out at J.A. 815-816. See also G.C. Br. I, 16-46, 88-92. Rather than set out all the facts in detail (the Trial Examiner only skimmed the surface), we have lodged a copy of the General Counsel's brief with the Court and referred to it in this brief.

After protesting the merit rating, explaining that the foreman had not offered any justification for it, and telling Assistant Personnel Manager Phelps the facts contained in the employees' notebook,

"We [the union representatives] proceeded to ask for the records, standards, et cetera, and Mr. Phelps told us that we have presented no facts or substantiation that Dennis had been improperly rated, and we in turn asked him what facts he had that Dennis was properly rated, *and he told us that he had facts but he would not present them because the burden of proof is on the union.*

"Q: Did Mr. Phelps make a disposition of the grievance at this meeting?

"A: Yes. He denied the grievance." (J.A. 108 emphasis supplied.)

The senior steward's testimony, quoted above, is substantiated by notes of the meeting (J.A. 572). The employees' complaint, it should be noted, resulted from his having been downgraded during a period when he felt he had improved. See J.A. 97-100. Of course, the record also shows that the facts the union sought in order intelligently to evaluate and, if warranted, process merit rating grievances, were in the Company's exclusive possession J.A. 576.³⁰

Not surprisingly, the Trial Examiner found that the Company had failed to bargain in good faith by refusing to produce records "which . . . were relevant and necessary to the Union's intelligent processing of merit rating grievances (J.A. 815-816), "by refusing to discuss grievances with stewards" (J.A. 816), and, in one instance, by refusing to call a steward upon an employee's request. The particular records to which the Examiner referred were notebooks kept by foremen wherein they recorded their

³⁰ For other instances of the Company's success in preventing any meaningful discussion of grievances, see pp. 19-21, *supra*, and G.C. Br. I, pp. 53-87.

observations, pursuant to the Company's instructions (J.A. 555) to record employee performance (J.A. 816); employee reports, wherein the Company records employee conduct warranting commendation or discipline (J.A. 815); quality review orders wherein the Company inspectors record (and transmit to supervisors) deficiencies in parts and the names of employees who worked on them (J.A. 815); and Production Inventory Control reports which show the status of parts, the name of the employee or employees working on each part, the time spent in producing or performing a series of operations on the parts, and the relation between the time spent by an employee on the part and a standard time, and "nonproductive time" (J.A. 815).

IV. ALLEGED VIOLATIONS SUBSEQUENT TO THE EVENTS AT ISSUE HEREIN

After the Board issued its Decision and Order dismissing this proceeding, the Unions petitioned for reconsideration based in part upon facts alleged in a subsequent unfair labor practice case (Nos. 1-CA-7890, *et al.*) wherein the General Counsel had issued a complaint, the Company had filed a motion for summary judgment, based partly on the decision herein, and the General Counsel had filed a response setting forth the facts he intended to prove in the event summary judgment were denied in the new case.³¹ In that response, the General Counsel alleged that a union member, whom the Company had kept at work for 3 years after he passed the retirement age, was told by his foreman and general foreman in April 1971, that he would be retired 10 weeks prior to the termination of his last extension upon the insistence of his bargaining agent, Petitioner Lodge 700. The statement blaming Lodge 700 was false. Nevertheless, the allegation was given "wide circulation by Respondent in order to disparage the union in

³¹ The Unions attached the General Counsel's Response To The Company's Motion for Summary Judgment in 1-CA-7890, *et al.*, to their petition for reconsideration in this case. That response was therefore part of the record upon which the Board's order herein rests and is thus before the Court, as the Board concedes. See its Certified List, p. 7, filed in this Court on February 7, 1974.

the eyes of the employees" (General Counsel's Response, p. 11). See *id.*, pp. 9-11.

The General Counsel alleged further that upon the appointment of Albert Weingarten as a Union Steward, he complained to a foreman about the operation of lift trucks by unauthorized employees, which, he asserted, was a safety hazard. Although the contract provided that an informal conversation between a steward and a foreman was the means of initiating a grievance, the foreman responded that Weingarten was a "troublemaker," that the "matter was none of his business, and that the practice would continue." Thereafter, the steward sought to initiate a grievance and requested that a shop steward be called. The foreman responded that no "goddamn steward" was needed. A few moments later the foreman approached the steward and engaged in a ten to fifteen minute diatribe against Union representatives in the plant, told the steward he was in a department where he was not wanted, that he was "disrupting" work and "badgering" the foreman and that the latter would "walk [the steward] out of the department" whenever he decided to. The foreman added that "he didn't care what the goddamn union did," that "he would do whatever he wanted to do in the department" and that the "goddamn union couldn't do anything about it." The foreman went on to curse "all you union people . . ." and stated, *inter alia*, that "where he come [sic] from they took care of people like this" (G.C. Response, pp. 8-9).

Finally, the General Counsel alleged that a foreman had refused to call a steward on another occasion and that the Company was continuing to refuse to supply requested, relevant information in merit rating grievance proceedings, including relevant entries in notebooks kept by foremen (G.C. Response, pp. 4-5).

The General Counsel concluded that the facts alleged in his complaint, if proved at trial, would establish that the

Company had violated Sections 8(a)(5) and (1) of the Act. At this writing, the Board has not acted upon the Company's Motion for Summary Judgment in Case No. 1-CA-7890, *et al.* But it denied the Unions' petition for reconsideration in this case.

V. THE BOARD'S DECISION AND ORDER

On these facts and allegations,³² as we have seen, the Board found that "there is positive evidence of maturation of the collective-bargaining relationship" (J.A. 847). It further found that "the nature and scope of the acts currently alleged to show hostility . . . [towards Company employees' exercise of rights protected by the Act] . . ." (J.A. 842-843) do not "reflect a pattern of continuation of prior unfair labor practices found against this Respondent" (J.A. 845).

ARGUMENT

I. HAD THE BOARD PROPERLY APPLIED THE STANDARD IT ERECTED IN THIS CASE TO THE RECORD, IT WOULD HAVE BEEN COMPELLED TO ADJUDICATE AND REMEDY THE UNFAIR LABOR PRACTICES ALLEGED

A. The Unfair Labor Practices Alleged Were Simply A Continuation of Aircraft's Adjudicated Pattern of Labor Act Subversion

On the Board's own theory, its decision must be reversed. For the Board said (J.A. 842-843):

"Where the facts show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation, there is serious reason to question whether we ought defer to arbitration.

"However, the nature and scope of the acts currently alleged to show such hostility, together with a measure of the current impact of any past such acts, must all be evaluated . . ."

³² See p. 7, n. 9, *supra*.

The Board then announced (J.A. 843):

"If the conduct here complained of, viewed in the context of serious past unlawful conduct, appears to establish a continuing pattern of efforts to defeat the purposes of our Act then . . . it would seem obvious that we could not reasonably rely on the parties' voluntary machinery fairly and promptly to resolve the underlying problem. In such a situation, therefore, the Act's purposes could best be served by our taking jurisdiction in the first instance."

As the dissenters pointed out (J.A. 852), the majority "apparently" found

". . . that the conduct of the earlier cases did not continue in this case, [but] that finding is without basis and ignores the fact that much of the conduct alleged in the instant case is contemporaneous with the conduct found unlawful in the case reported in Volume 188. In any case, the character of the harassment and discrimination alleged as unlawful in this case appears to be virtually identical or sufficiently close in many instances to the conduct unlawful in the Volumes 179, 180, and 188 cases to permit no other conclusion but that, the conduct, if it occurred as alleged, is part of the same pattern of conduct."

The dissenters read the record correctly. Thus, the Company's imposition of a three-day suspension upon union supporter Sullivan for passing out merit ratings ("unauthorized literature," according to the Company) for a few moments inadvertently after the buzzer sounded, while other employees who distributed and discussed the same rating forms some time *later* went unpunished, is virtually identical to the Company conduct held unlawful in *Sherman*, 188 NLRB 633 (1971). Furthermore, the two-week suspension given steward Raymond, the sweeping coercive investigations of trivial claims of steward and union sympathizer misconduct, the warnings to other employees not to talk to stewards and to stewards that they must not

talk to other employees and that the Company would treat them more harshly than others, and the arbitrary and discriminatory³³ refusals to allow stewards to take briefcases out of the plant are part and parcel of the Company's steward harassment campaign which the Board held unlawful in *Weil* (179 NLRB at 935). Indeed, the Company utilized some of the same tactics there as here. Thus, there as here, the Company carried out widespread investigations that included lengthy interrogations conducted in an "overbearing and intimidating manner" in which it unlawfully inquired about protected union activity. 179 NLRB 937. In *Weil* and *Peterson*, 180 NLRB at 281, 179 NLRB 944-945, 440 F.2d at 92, as here, p. 10, *supra*, Company statements taken by security personnel omitted exculpatory information or were otherwise misleading. In *Weil*, the investigations turned up minimal or trivial evidence upon which the Company disciplined stewards ostensibly for conducting union business on Company time for very brief periods (179 NLRB at 937);³⁴ here the Company disciplined a known union activist for the same reason and in the same fashion. There, as, in different words, here, the Company warned a steward that when he put on a union badge he was "on thin ice" (*id.*, at 936, n. 6) (compare pp. 18-19, *supra*), and put teeth in that warning by discriminatorily disciplining and coercively interrogating a union steward.

In both *Weil* and *Peterson*, as here, moreover, the Company refused to call a shop steward at the request of employees, including employees subjected to interrogation which the employees reasonably believed would lead to discipline. 179 NLRB at 937; 180 NLRB at 280.³⁵

³³ As shown in the Statement, pp. 17-18, *supra*, other employees who had reason regularly to take pocketbooks or other materials in and out of the plant were either exempt from the pass requirement or were issued monthly passes.

³⁴ See also *Sherman*, *supra*, 188 NLRB 633.

³⁵ See generally *Quality Mfg. Co.* 195 NLRB 197 (1972), *enforcement denied in relevant part*, 481 F.2d 1018 (4th Cir. 1973), *rev'd*, 43 L.W. 4282.

In addition, the record here shows, *supra*, pp. 24-25, that the Company's steadfast, unlawful refusal to supply information bearing on merit rating grievances has been Company policy since long before the incidents litigated in "volumes 179, 180, and 188" of the NLRB reports. See also p. 6, *supra* (refusal to supply names and addresses of employees).

Furthermore, as the dissenters observed, much of the conduct at issue here was virtually contemporaneous with the conduct held unlawful in *Sherman*, *supra*, 188 NLRB 633.³⁶ Thus, the suspensions of Raymond, Sullivan and Urbanowicz, and the coercion, threats and harassment of union stewards litigated here, all occurred between mid-1969 and the end of 1970. The discriminatory discharge in *Sherman* occurred in December, 1969. And, as we have seen, evidence was brought to the attention of the Board that the Company's unlawful conduct continued on into 1971. See pp. 27-29, *supra*.

This recapitulation demonstrates that insofar as the Board majority concluded that "viewed in the context of serious past unlawful conduct" the unfair labor practices alleged herein do not "... establish a continuing pattern of efforts to defeat the purposes of our Act" (J.A. 843), the Board erred. On the contrary, the record shows that "much of the conduct alleged in the instant case is contemporaneous with . . . [and] virtually identical or sufficiently close in many instances to the conduct [previously] found unlawful . . . [to] . . . permit no other conclusion but that, the conduct . . . is part of the same pattern of conduct." (J.A. 852) (dissenting opinion). Since the

In *Weil*, *supra*, the Board reversed the Examiner's conclusion that the refusals constituted violations of § 8(a)(5) of the Act on the ground that the Company, as a matter of law, at that time had no obligation to bargain with the Unions. 179 NLRB at 937-938.

³⁶ *Sherman* was the case cited in *National Radio* as the paradigm for Board action. See pp. 47-49, *infra*.

Board's order rests on the opposite premise, it must be reversed. See *Universal Camera Corp. v. Labor Board*, 340 U.S. 474 (1951).

B. The Board's Conclusion That There Is "Positive Evidence of Maturation" Warranting Deferral Is Not Supported On The Record

In rationalizing its result here, the Board stated that "there is positive evidence of maturation of the collective bargaining relationship" (J.A. 847). Since the unions have not committed any unfair labor practices since the 1960 strike, we assume that the Board's pronouncement refers to some recent change in Aircraft's approach to its statutory responsibilities. The Board points to none whatever. But it does purport to rest its decision to defer on three factors: 1) the size of respondent's operations and work force; 2) the Board's observation that "in large part the acts of harassment and coercion alleged herein consist of activities of . . . individual first-level supervisors . . . and plant security employees" and 3) Aircraft's compliance with two arbitration awards (J.A. 844, 845). These "factors" were present in the earlier cases, and this Court, upon the Board's urging, expressly rejected the second as a ground for deferral. In any event, as we show below, they are all irrelevant.

1. The Size of Respondent's Operation and Work Force

We are frankly perplexed by the Board's reliance on the size of Aircraft's operations to justify dismissal of these proceedings. The Board itself noted ". . . at the outset that the unfair labor practices *previously found* to have been committed by Respondent [and previously found to have evidenced a pattern of defiance of the Act] . . . occurred in various of Respondent's plants within the State of Connecticut which employ . . . over 40,000 employees." (J.A. 844.) (Emphasis supplied.) Hence, that fact did not

justify deferral in *Weil, Peterson, or Sherman, supra*. It cannot do so here. See also *Weil-Peterson*, 440 F.2d at 100 (dispersal of violations at several plants demonstrates pattern of violations).

The Board's reference to 40,000 employees in "various" plants is not only irrelevant; it is misleading. Respondent's "various" plants in Connecticut are not involved in these proceedings; only three are (J.A. 796). In fact, in a fourth Connecticut plant, this Court recently affirmed a Board refusal to bargain finding. See pp. 6-7, *supra*. Furthermore, even at the plants where the unfair labor practices litigated herein occurred, only a portion of the employees are in the bargaining units. Hence, the 40,000 figure is totally inapposite. It is a measure of the indefensibility of the majority's ruling that it has resorted to misleading irrelevancies to justify its result.

2. *That the Violations Were Committed by Low-Level Supervisors and Plant Security Personnel Does Not Establish a Basis for Dismissing the Instant Complaint*

The Board's acceptance of Aircraft's contention that deferral was appropriate because the acts of harassment were committed by low-level supervisors and "several" plant security personnel (J.A. 844), runs headlong into the prior cases wherein the Board and this Court rejected Aircraft's defense based on the low level of supervisory and security employees involved. This Court wrote (440 F.2d at 92):

"It defies credulity to argue that the investigators were doing this without the knowledge and sanction of upper-echelon company officials. In fact, the record reveals numerous instances of investigations being initiated or supervised by the personnel department. Finally, we disagree with the implied premise of United Aircraft's argument: that it is not responsible for the acts of its investigators."

We think this Court was correct.³⁷

Virtually all unfair labor practices are committed by first-level supervisors, who, being at the bottom of the management hierarchy, have the most contact with rank and file employees. Presumably, relying on the irrelevancy of this factor, moreover, the Examiner sharply curtailed the General Counsel's effort to explore the role of higher level management in the incidents litigated (see p. 16, n.18, *supra*).

Despite this restriction, however, the record shows that the first-level supervisors did not act on their own. Thus, the Sullivan investigation and suspension were handled by a team, including his foreman and general foreman, and a group of interrogators, and the penalty was considered and sustained through every step of the grievance procedure and taken to arbitration. The investigation and suspension of Raymond were similarly handled by a team which included personnel advisors (p. 14, *supra*); and his suspension was recommended to the "manufacturing manager" by Pratt & Whitney's Assistant Personnel Manager, who has jurisdiction over the Pratt & Whitney Division's Connecticut plants, p. 16, *supra*. Similarly, when foremen denied stewards passes to take union briefcases out of the plant, they acted pursuant to a policy and specific instructions from personnel advisors, and therefore in accord with Company policy. See pp. 17-18, *supra*. Thus, even those acts of intimidation and harassment which

³⁷ Apparently, the Board was unwilling to confront the inconsistency between this Court's teaching and the Board's analysis here. In order to escape the force of that teaching, the Board created a new, almost insuperable burden of proof and placed that burden upon the General Counsel and the charging parties: "... [A]lleged misconduct by a few should not lead us to overly hasty conclusions. Such occasional first-level supervisory misconduct does not, in our view, necessarily establish a disinclination on the part of Respondent to accept the reality of collective representation or to honor its contractual commitments dealing with procedures for dispute resolution." (J.A. 845.) (Emphasis supplied.) Thus, only a "necessary" connection between supervision and investigation misconduct and management hostility to the "reality of collective representation" will avoid deferral.

were perpetrated initially by "low-level" supervisors, had the authority and approval of top management. They therefore cannot be dismissed as if they represented a mere frolic by individual supervisors and security personnel.

The Board's reference to the small "proportion" (J.A. 844) of supervisors involved is a variant of its "low-level" argument. Premised on the legal assumption that 20 employees in a department of a very large company comprising many departments are not entitled to the same protection from unlawful coercion by their immediate supervisors as they would be if their employer had only three such departments, the argument ignores the numerous cases wherein the Board has noted that news of anti-union coercion and harassment travels fast and far and necessarily has an intimidating effect on other employees. *E.g.*, *Frankel Associates, Inc.*, 146 NLRB 1556 (1964); *Darby Cadillac*, 169 NLRB 315 (1968). Making proportionality a ground for deferral, moreover, will increase the Board's caseload by requiring the General Counsel to investigate and prove every act of supervisory misconduct that he can uncover in order to establish that the unspecified proportion of supervisors has transgressed.

But most important, viewed from the standpoint of impact upon affected employees, percentages are irrelevant, where, as here, yet another example of hostility to the exercise of protected rights goes unremedied. Thus, it has long been the law that even "isolated," unlawful acts by supervisors will not be disregarded where, as here, the employer has a history of anti-union hostility, so that their coercive remarks may "induce in subordinate employees a reasonable apprehension that the acts condemned reflect the policy of the employer." See *Consumers Power Co. v. NLRB*, 113 F.2d 38, 44 (6 Cir. 1940); *NLRB v. Mylan-Sparta Co.*, 166 F.2d 485 (6 Cir. 1948). Significantly, Aircraft has not *disavowed* the unlawful conduct of its

supervisors; on the contrary, it has vigorously defended it. Compare *NLRB v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290 (5 Cir. 1971), where the Board successfully brought *contempt* proceedings against an employer based upon the coercive statements of the lowest ranking supervisor in the plant, *who had disobeyed explicit instructions in making unlawful statements to employees*. Indeed, given the tight, bureaucratic structure of large enterprises, including Aircraft, it is highly unlikely that even a few supervisors would have engaged in the conduct alleged here if they believed that their superiors disapproved. See *NLRB v. United Aircraft Corp.*, 440 F.2d at 92, quoted, *supra*, p. 34. See generally, Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 721, 722-724 (1973).

Finally, the "first-level" supervisor defense has no bearing whatever upon the alleged violations affecting the grievance machinery, most of which were perpetrated as a matter of long-standing Company *policy* and defended not only in the grievance machinery, but in this proceeding as well by and with the support of top Company officials, see pp. 21, 24, 24-26, *supra* (refusals to make available any information relevant to merit rating grievances and to settle such grievances except in the absence of union stewards), or which were committed with the approval of or under instructions from higher level management. See pp. 10, 12, 16, 16-18, *supra*.

3. *Compliance With Two Arbitration Awards Does Not Evidence Compliance With Provisions of the Labor Act Enforced By The Board*

Aircraft's compliance with two arbitration awards does not evidence "acceptance" of its statutory obligations in the area of collective representation.³⁸ Given the virtual

³⁸ *Malrite Corp. of Wisconsin, Inc.*, 198 NLRB No. 3, 80 LRRM 1593, reversed in part sub nom. *Local 715 IBEW v. NLRB*, 494 F.2d 1136 (D.C. Cir.

impossibility of a successful defense on the merits in a suit to enforce an arbitration award, see generally, *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Andrus v. Convoy Co.*, 480 F.2d 604, 606 (9 Cir. 1973) (collecting cases), cert. denied, 414 U.S. 989 (1973), Aircraft had no alternative. Furthermore, when the awards were rendered, both discriminatory suspensions were being litigated in the instant Board proceedings, where the Company was contending, as it had in prior cases, that the Board should delegate its responsibilities to arbitrators and not adjudicate, or, more to the point, remedy, any of the violations alleged herein. Indeed, had *the Board really* "attempt[ed] to place the relevant factors in context . . ." (J.A. 844), it would have recognized that Aircraft has sought for well over a decade to interpose its insistence that the Unions arbitrate Aircraft's unfair labor practices as a bar to proceedings that might eventuate in court enforced Board orders. See *Lodge 743, Int. Ass'n of Mach. v. United Aircraft Corp.*, 337 F.2d 5 (2 Cir. 1964), cert. denied, 380 U.S. 908 (1965); *Weil-Peterson, supra*, 440 F.2d at 99-100.

Unlike the narrow piecemeal awards issued in individual arbitrations, court enforced Board orders are backed by the sanction of contempt, and thus could force the Company

1974) demonstrates the irrelevance of compliance with arbitration awards. There, an arbitrator held that an employer breached his contract by assigning engineers' work to announceers and awarded relief to the union. The employer refused to comply with the award, and asserted that it would no longer deal with the union as bargaining representative of the employees in light of their changed duties. The Union filed unfair labor practice charges. Although the employer's course of conduct "historically . . . has been considered an unfair labor practice going to the heart of the statute," (*Malrite, supra*, 80 LRRM at 1595) (dissenting opinion), the Board majority dismissed because ". . . we cannot agree [with the Trial Examiner] that noncompliance with the award should be a matter for the Board's concern." (id. at 1594). (Emphasis supplied). Evenhanded application of the Board's deferral policy dictates that since such non-compliance with arbitration awards is of no concern, compliance is also irrelevant. Both are matters for the courts. *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

to terminate its persistent defiance of the Labor Act.³⁹ It is that strategy, rather than a "mature" acceptance of the obligations of the Act that explains the remarkable, unprecedented series of cases wherein the Company has compelled the Unions to entertain grievances and to arbitrate the facts underlying certain of the Company's unfair labor practices.⁴⁰ In addition, the Company knows full well that many forms of anti-union harassment short of suspension and discharge are not arbitrable grievances, as the Board in effect conceded. J.A. 846, n. 5; compare J.A. 855-856 (dissenting opinion). Thus, Aircraft's compliance with isolated arbitration awards connotes not acceptance of, but a strategy to escape from, the Labor Act's prohibitions.

Finally, in focusing upon Aircraft's compliance with the arbitration awards, the Board ignored the substance of the arbitrated controversies. The grievances did not involve the run of the mine disputes over wages, hours, and other terms and conditions of employment which unions "voluntarily resolve with [law abiding] employers under their contracts," rather than "come [with] to" the Board (J.A. 846-847). These arbitrations concerned discriminatory suspensions, one allegedly for demanding steward representation in the course of a disciplinary interview, and the other on a trumped-up charge that a union activist was distributing "unauthorized literature" (i.e., merit ratings) after the buzzer sounded in violation of a Company rule. Like the other conduct alleged in the complaint, the misconduct underlying these "disputes" rends the fabric of the collective bargaining relationship. They are the kind

³⁹ The repetitions in the instant case of conduct held unlawful in *Weil-Peterson* might have given rise to contempt proceedings, were it not that the violations here preceded this Court's order in that case.

⁴⁰ *United Aircraft Corp. v. Canel Lodge 700, IAM*, 314 F.Supp. 371 (D. Conn. 1970), affirmed 436 F.2d 1 (2 Cir. 1970), cert denied, 402 U.S. 908 (1971); *United Aircraft Corp. v. Lodge 743, IAM*, 77 LRRM 3136 (D. Conn. 1971); *United Aircraft Corp. v. Canel Lodge 700, IAM*, 77 LRRM 3167 (D. Conn. 1971).

of "labor disputes" the Board regularly "resolves" precisely because "Congress created the National Labor Relations Board to supervise the collective bargaining process." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).⁴¹ Such controversies are grist for the Board's mill. See, e.g., *Quality Mfg. Co.*, *supra*, note 24, BNA, Labor Relations Cumulative Digest and Index Key No. 52.2738 (1973); *id.*, (1972); *id.*, (1971); *id.* (1966-1970); 1 *id.* (1960-1965) (collecting numerous cases).⁴² Compare *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 584 (1960). Thus, the Board simply falsified its own experience when it petulantly remarked that "... most labor organizations under such circumstances do not come to us with such problems and instead resolve them voluntarily with the employers under their contracts" (J.A. 846, 847). The Board knows full well that employers who honestly accept their statutory bargaining obligations do *not* harass and intimidate union activists and employees who seek their help or turn the grievance machinery into a farce by withholding information and refusing to deal with union representatives. And the Board's sarcasm cannot hide its studied refusal to recognize the distinction between the kinds of disputes which arise and can be "voluntarily" resolved in the course of a "harmonious and stable" bargaining relationship and those which are merely a symptom of a historic "pattern of action subversive of Section 7 rights" *National Radio Co.*, 198 NLRB No. 1 (1971), 80 LRRM 1718, 1724, citing *United Aircraft*. Aircraft's compliance with

⁴¹ "The Board [it was intended] would act to see to it that the process worked." *Ibid.* (emphasis supplied). See also *id.* at 105.

⁴² In *Mobil Oil Corporation*, 196 NLRB 1052, *enforcement denied*, 482 F.2d 842 (7 Cir. 1973), the Board wrote:

"... [i]t is a *serious violation* of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection. . . ." (*Ibid.*; emphasis supplied.)

two arbitration awards *reflecting* that pattern does not evidence abandonment of it.

C. The Board Erred In Deferring Because The Evidence Indicates That The Parties' Grievance Machinery Is Not Functioning Fairly And Smoothly

The Board majority stated that it could not reasonably "rely on the parties' own machinery" if the complaint allegations appeared to establish a "continuing pattern of efforts to defeat the purposes of our Act . . . *particularly* if the evidence also should indicate that the parties' own machinery is either untested or not functioning fairly and smoothly . . ." (J.A. 843) (emphasis supplied). Having said that, the majority proceeded blithely to disregard the allegations of conduct establishing that respondent had violated the Act by unlawfully withholding information at *every* step of the grievance procedure necessary to make it work; by refusing to deal with and by-passing union stewards; and by denying or disciplining employees for making requests for steward representation—which plainly "indicate[d] that the parties' own machinery is . . . not functioning fairly and smoothly" (J.A. 843).

Indeed, the Board's deferral of the information denial allegations of the complaint was a departure from prior law. In *American Standard, Inc.*, 203 NLRB No. 169, 83 LRRM 1245, decided June 4, 1973, while the instant case was awaiting decision by the Board, it wrote (83 LRRM 1246):

"It is now well settled that a collective bargaining representative is entitled to information which may be relevant to its task as bargaining agent, and this is not a matter for deferral to arbitration where, as here, the material is sought as a statutory, rather than a contract, right.⁴ It is clear in the case before us that there is no contract clause dealing specifically

⁴ E.g., *The Timken Roller Bearing Company*, 138 NLRB 15, 50 LRRM 1508, enf'd. 325 F. 2d 746, 54 LRRM 2785 (C.A. 6, 1963)."

with the furnishing of information necessary and relevant to the processing of grievances or any other clause by which the Union waives its statutory right to such information.⁵ Under these circumstances we do not agree with the Administrative Law Judge that this issue should be deferred to the arbitration procedure under Collyer.

⁵ See, e.g., *Acme Industrial Company*, 150 NLRB 1463, 1465, 58 LRRM 1277, enforcement denied 351 F. 2d 258, 60 LRRM 2220 (C.A. 7, 1965), reversed and remanded 385 U.S. 432, 64 LRRM 2069 (1967).''

It was also "well settled" (*American Standard, supra*) that a *waiver* of the right to information relevant to processing grievances must be express, and in "clear and unmistakable language." *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6 Cir. 1963),⁴³ citing, *inter alia*, *Tide Water Associated Oil Co.*, 85 NLRB 1096. Accord, *Fafnir Bearing Co.*, 146 NLRB 1582, 1585, enforced, 362 F.2d 716, 722 (2 Cir. 1966); *NLRB v. Perkins Mach. Co.*, 326 F.2d 488 (1 Cir. 1964); *International Tel. & Tel. v. NLRB*, 382 F.2d 366, 373 (3 Cir. 1967). That is the converse of the arbitration holdings that absent a contractual promise to supply information, a union is ordinarily not entitled to it. See, e.g., *North Am. Av., Inc.*, 19 Lab. Arb. 385; *Borg Warner Corp.*, 9 Lab. Arb. 901; *In re Spartan Mills*, 27 Lab. Arb. 256; *International Harvester Co.*, 22 Lab. Arb. 191

Not surprisingly, therefore, the General Counsel had anticipated the *American Standard* decision. In his "Arbitration Deferral Policy Under Collyer—Revised Guidelines," dated May 10, 1973, pp. 20-21 (*infra* pp. A-3 to A-7⁴⁴), he instructed the Board's Regional Directors not to defer informational unfair labor practices even where the denial of information was being challenged before an arbi-

⁴³ *Timken, supra*, was cited with approval in *American Standard, Inc., supra*, 83 LRRM 1246, n. 4. See also *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

⁴⁴ The relevant portions of the Guidelines are printed in Appendix A, *infra*, pp. A-1 - A-7.

trator. He reasoned that the *Collyer* policy provides an additional reason for not deferring an alleged unlawful denial of information to arbitration because that violation "strikes at the heart of the process itself and inhibits the full and fair use of that process" (*infra* pp. A-4 to A-5, n.23). He went on to explain (*ibid.*):

"The *Collyer* policy places a substantially greater reliance on private dispute settlement procedures and therefore makes the full availability of information relevant to the disposition of grievances even more important. Board enforcement of the duty to furnish relevant information is an additional means of assuring that arbitration awards will be supported by substantial evidence bearing on the contractual and statutory issues raised by the dispute, thereby minimizing the number of cases in which the arbitration fails to meet the 'fair and regular' test established by *Spielberg*. Instructive in this regard is the Board's observation in *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB No. 44, that in 'declining to intervene in disputes best settled elsewhere we must assure ourselves that those alternative procedures are not only "fair and regular" but that they are and were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures.'"

We submit that the General Counsel's logic there was better than the Board's here. "... Board ... exercise [of] its authority to accord the opposing parties a wide latitude of discovery before arbitration ... was specifically approved by the Supreme Court in *NLRB v. Acme Industrial Co.* to facilitate production of relevant information prior to arbitration. Certainly, if the Board is going to encourage the use of arbitration in resolving economic [sic] difficulties, it should encourage the furnishing of information so that the parties can be prepared to confront the issues knowledgeably." *Murphy & Sterlacci, A Review of the National Labor Relations Board's Deferral Policy*, 42

Ford. L. Rev. 291, 357 (1973) (hereinafter "MURPHY & STERLACCI"). (Footnotes omitted.)⁴⁵ As the dissenters here pointed out (J.A. 854-855):

"The effect of our colleagues' holding is to violate the spirit of the Supreme Court's decision in *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432. In that case, the Court noted that Board orders compelling the disclosure of information are an aid to the arbitration process, stating at 438:

"Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. [Footnote omitted.]

Thus the Court emphasized the ability of the union to evaluate the merits of a grievance. The majority's holding will preclude such evaluation."

The dissenters also captured the peculiar irony in remanding these proceedings to an arbitrator in the name of "promptness." (J.A. 843):

"Furthermore, the majority's decision will preclude a quick vindication of employee rights, thus ignoring still another of its *Collyer* criteria. The effect of our colleagues holding herein is to require employees in many cases to go through two arbitration proceedings before they can obtain vindication of their rights. Thus, under the contract herein, an employee may file a

⁴⁵ "The Court's decision [in *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)] thus finally removes discovery disputes from the ranks of those in which the Board might defer to an arbitrator's decision. It confirms that the statutory right to relevant information overrides any more restrictive term in a collective agreement." *Comment, The NLRB and Deference To Arbitration*, 77 Yale L.J. 1191, 1210 (1968).

grievance concerning his merit rating. At step 2, the employee is entitled to 'such pertinent existing production, payroll, attendance records, and disciplinary notices pertaining to the employees involved as may be necessary to the settlement of a grievance at this step of the grievance procedure.' Respondent is alleged to have denied employees this information in violation of Section 8(a)(5). The collective-bargaining agreement provides that violations of step 2 of the grievance procedure are themselves subject to the grievance procedure and ultimately to compulsory arbitration. Thus, in order to obtain the information necessary for the processing of a merit rating grievance under the contract, a grievant will initially have to file a grievance and process it to the point where the requested information is denied at step 2 and file another grievance which will be filed and processed to arbitration, at which point the employee presumably can seek to further process the original grievance. This cumbersome procedure can hardly be described as a quick vindication of employee rights. Moreover, it places the exact strain on the arbitration process which concerned the Court in *Acme Industrial, supra*" (J.A. 855).

We need only add that the Supreme Court has said in virtually this same context that "... in the labor field, as in few others, time is crucially important in obtaining relief." *NLRB v. C & C Plywood*, 385 U.S. 421, 430 (1967). See also *Local Lodge 1424, IAM v. NLRB*, 362 U.S. 411, 419 (1960); *NLRB v. Marine Workers*, 391 U.S. 418, 425 (1968).

We submit, on the cited authorities, that, as a matter of law, the Board may not defer in the face of a complaint alleging unlawful denials of information and access to the grievance procedures. For such a complaint undercuts the Board's "fundamental assumption that the parties own procedures will effectively resolve the current disputes in a prompt and fair manner." Deferral on this record could not be justified by the supposed finding of the Adminis-

trative Law Judge that the Sullivan and Urbanowicz grievances had been "fully and successfully processed under the parties' voluntary machinery" (J.A. 845) because the Administrative Law Judge made no such finding. See J.A. 804, 808, and note 49, *infra*. Nor can deferral be justified by Aircraft's compliance with arbitration awards, since the Board can have no confidence that future awards will be "fair" and cannot test the fairness of any award after the fact if it is preceded by a truncated discovery process. The Board's order must be reversed.

II. BY REFUSING TO ADJUDICATE AND REMEDY A SERIES OF ALLEGED LABOR ACT VIOLATIONS BY A STATUTORY RECIDIVIST THE BOARD ABDICATED ITS UNIQUE RESPONSIBILITY TO ENFORCE § 8 OF THE NATIONAL LABOR RELATIONS ACT

A. From Collyer to United Aircraft: A Study in
"Seductive Plausibility"

"The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth "logical" extension occurs. Each step, when taken appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.⁵ This kind of gestative propensity calls for the 'line drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'

⁵ Mr. Justice Holmes had this kind of situation in mind when he said:

'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.' *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355."

United States v. 12 200-Ft. Reels, 413 U.S. 123, 126 (1973). As we show below, assuming *arguendo* that *Collyer Insulated Wire*, 192 NLRB 837 (1971) was rightly decided, this case "calls for the 'line drawing' " to which the Supreme Court referred.

The conflicting policies which are involved here were described by the Board itself as "on the one hand, the statutory policy favoring the fullest use of collective bargaining and the arbitral process and, on the other, the statutory policy reflected by Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices." *Id.* at 841. Yet, in the present case, the latter policy was wholly subverted, and not even given lip service.

In *Collyer, supra*, the Board, two members dissenting, adopted a policy of refusing to adjudicate unfair labor practice cases where "[t]he contract and its meaning . . . lie at the center of th[e] dispute, 192 NLRB at 842, and the facts "present not only an alleged [isolated] violation of the Act but also an alleged breach of the collective-bargaining agreement subject to arbitration." *Id.* at 841. *Collyer*, and cases following it, applied that policy to unfair labor practice complaints alleging, at bottom, a unilateral (and therefore unlawful) change in working conditions which an employer or union defended on the ground that the change was licensed by a collective agreement. As the Board majority saw it, those cases presented "classic" contract disputes in the "guise" of unfair labor practices. 192 NLRB at 842, 843. In dismissing those complaints, the Board invited the party aggrieved to seek a remedy through contract grievance negotiation and arbitration. See generally *Murphy & Sterlacci*. After those proceedings were completed, the Board stated, it would entertain motions to consider whether the arbitration procedures were fair and regular and whether the results were "repugnant" to the Act.⁴⁶

Subsequently, in *National Radio Co.*, 198 NLRB No. 1, 80 LRRM 1718 (1972), the Board deferred resolution of a dispute which did not, as in *Collyer*, "in its entirety arise

⁴⁶ J.A. 848, 849, *Murphy & Sterlacci, supra*, at 304. The promise may be an empty formalism where an employer is determined to disparage and harass a union. See *Malrite of Wisconsin, Inc., supra*, p. 37, n. 38.

... from the parties' relationship under the contract" (192 NLRB at 839). The Board majority stated that it would defer in cases wherein it deemed it reasonable to assume "that the arbitration procedure will resolve [the] dispute in a manner consistent with the standards of *Spielberg*" [i.e., where the award would not be repugnant to the policies of the Act]. (80 LRRM 1723; see *id.* at 1722, n. 6.) In applying this newly articulated standard in *National Radio*, the Board for the first time deferred a charge alleging anti-union discrimination. The majority adhered to its assumption that deferral was consistent with the Act's policies, despite the allegation of anti-union animus, because of the parties' "long established . . . and stable productive relationship." (*Id.* at 1724). In so holding, the Board expressly contrasted the case of a *recidivist* against whom a charge involving anti-union animus was brought:

"... although the alleged violation of Section 8(a)(3) subsumes a charge of union animus by Respondent, we believe this case must be distinguished from those in which a *history of such animus or pattern of action subversive of Section 7 rights* has been alleged."¹⁶

¹⁶ Compare *United Aircraft Corp.*, 188 NLRB No. 96 [footnote in original]."

80 LRRM at 1724. (Emphasis supplied.)

Thus, in *National Radio*, the majority took pains to leave *Sherman* ("188 NLRB No. 96") undisturbed. There, the Company had repeatedly urged the Board to defer to arbitration, but the Board, on interlocutory appeals, and again in its final decision, expressly rejected the request for deferral, reached the merits and concluded that the Company had illegally discriminated against a union steward.¹⁷ Nevertheless, when this case reached the Board,

¹⁷ In *Sherman*, Member Brown, who, during his service on the Board was the leading protagonist of deferral to arbitration, said (188 NLRB 633, n. 1):

"Although Member Brown would normally defer to grievance-arbitration procedures in the type of situation involved here, he concurs in the present case in view of the posture of related Board decisions in 179 NLRB No. 160 and 180 NLRB No. 49." 188 NLRB 633, n. 1.

Member Brown's views are particularly worthy of attention in light of Chair-

the majority ignored the *National Radio* distinction, elevated into an all but conclusive presumption its "fundamental assumption" (J.A. 844) that "disputes" of the kind there excepted can be fully and fairly resolved in arbitration (see J.A. 844, 845, 846, 847, 848)⁴⁸ and therefore applied its abstention doctrine to the very employer whose "alleged" "history [and] pattern of action subversive of Section 7 rights . . ." had been cited as the paradigm for action by the Board.

The Board majority held here that it would not determine whether a recidivist employer has again perpetrated a series of violations of the Act, and, if so, what remedy is required to make statutory rights a reality for its employees, where the General Counsel fails to overcome the Board's "fundamental assumption that the parties' own procedures" will "resolve" each separate "dispute" promptly and fairly. (J.A. 844) In the Board's view, the dispositive question is whether the parties agreed-upon grievance and arbitration machinery "works" (J.A. 845, Accord, J.A. 843). That term, as the Board's opinion makes perfectly clear, means only that the charged party is willing to arbitrate and abide by an adverse award, should one be rendered.

Because the Board asked only whether, in this narrow sense, the parties' machinery "works," it did not examine the motive and effect of the alleged statutory violations which an arbitrator had held violated the contract,⁴⁹ or the

man Miller's characterization of him as the "father of the *Collyer* doctrine." "Deferral to Arbitration—Temperance or Abstinence?" Remarks before the Georgia Bar Association, May 4, 1973, 83 LRR 72, 73.

⁴⁸ See, e.g., J.A. 846 ("By the same token, the alleged acts of harassment and discrimination, it seems to us, could also be resolved by the parties grievance procedures."); (J.A. 848) ("Having found that the parties' contractual grievance-arbitration process can, and does, function effectively and fairly and has continued to be utilized by the parties to their satisfaction [!], it is consistent with the Act to defer to arbitration).

⁴⁹ The Board's opinion states that "the Administrative Law Judge here dismissed the 8(a)(3) allegations as to employees Sullivan and Urbanowicz on the

alleged unfair labor practices which neither party contended were arbitrable under their agreement,⁵⁰ and *a fortiori* did not consider those facets of the alleged violations which were arbitrable. Further, the Board failed to consider, let alone determine, whether the probability of future violations and the chilling effect of Aircraft's past, present and subsequent unlawful practices on the felt freedom of employees to choose to bargain collectively and to be and become active union members required a Board remedy. Instead, the Board deferred in the hope (see J.A. 847) that the violations alleged, if handled piecemeal, would be "resolved." Its holding, in short, was that if an alleged violation can conceivably be relegated to arbitration, the Board will do so.

That holding establishes that the majority has become so enamored of the "seductive plausibility" of the *Collyer* principle that it has utterly forsaken its unique statutory responsibility to "safeguard" the rights declared in § 7 of the Act by preventing and remedying the unfair labor practices enumerated in § 8.⁵¹ The Supreme Court long ago thus defined the Board's statutory duty.

"The Board asserts a public right vested in it as a public body, charged in the public interest with the

ground that their suspensions had been fully and successfully processed under the parties' voluntary machinery." (J.A. 845). The Examiner made no such finding. He held instead that unfair labor practice findings on these incidents "would not add materially to the [recommended] order in this case" which was premised on other unfair labor practices. (J.A. 804). Accord, J.A. 808. He further found that the interrogation preceding the Sullivan suspension violated the Act and recommended a remedy. (J.A. 805, 818). The Administrative Law Judge thus made no finding that Company compliance with the awards, standing alone, remedied the unfair labor practices he had found, let alone that they did so "fully and successfully."

⁵⁰ Compare J.A. 846, n. 5; *id.* at pp. 855-856 (dissenting opinion).

⁵¹ 29 U.S.C. §§ 157, 158. The Board was created as a mechanism to "safeguard" the right of self-organization, which antedated the Act, by remedying conduct prohibited in § 8 which Congress and the Board believed interfered with that right. *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 263-264 (1940).

duty of preventing unfair labor practices. The public right and the duty extend not only to the *prevention of unfair labor practices by the employer in the future*, but to the *prevention of his enjoyment of any advantage which he has gained by violation of the Act*, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes. . . ." *Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (emphasis supplied).

That, of course, is the substance of "the statutory policy reflected [in] . . . Congress' grant to the Board of exclusive jurisdiction to prevent unfair labor practices," which the Board acknowledged in *Collyer* (192 NLRB at 841), but sank without trace here.

The Supreme Court's recent opinion in *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), issued after the Board decided this case, highlights the Board's error.⁵² There, the Court rejected contentions that under Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which prohibits employment discrimination based on race, religion, or national origin, a federal court is bound by or should stay its hand pending an arbitrator's decision under a contract. See 415 U.S. at 43. In reaching that result, the Court drew heavily on Labor Act jurisprudence, noting that Title VII "is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights." 415 U.S. at 50 (citation omitted). "Both rights," the Court said, "have legally

⁵² See also *National Radio*, *supra*, 80 LRRM 1724, n. 16; Comment, *NLRB Deferral Under Collyer*, 53 B.U.L. Rev. 711, 726 (1973) (existence of harmonious, mature relationship is condition of, and its absence precludes, deferral); Getman, *Can Collyer and Gardner-Denver Co. Exist?* 43 Ind. L. J. 285 (1974) (*Gardner-Denver* should lead to abandonment of *Collyer*).

independent origins and are equally available to the aggrieved employee." *Id.* at 52. The Court rejected respondent's contention that deferral was a proper accommodation between the statutory and arbitral forums (415 U.S. at 56-57):

"The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. Furthermore, we have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' U. S. Bulk Carriers v. Arguelles, 400 U.S. 358, 359-360 (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. . . . On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts."

The Labor Act, of course, is a statute "whose broad language frequently can be given meaning only by reference to public law concepts." And under that Act, the tribunal responsible for enforcing the statute is the Board, which is

"... empowered, according to the procedure provided in section 10, to prevent any person from en-

gaging in any unfair labor practice listed in section 8 'affecting commerce,' as that term is defined in section 2(7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or prevention. *The Board is thus made the paramount agency for dealing with the unfair labor practices described in the [Act].*"

(H.R. Rep. No. 972, 74th Cong. 1st Sess. p. 21) (emphasis supplied).⁵³

Alexander teaches, at the very least, that the federal policy favoring arbitration of contract disputes does not license the Board to "cast [statutory] dispute[s] in [contractual] terms," cf. *Collyer, supra*, 192 NLRB at 843, and remit them to arbitration where the result is deprivation of rights and remedies protected by the statute. For the Board performs the same function under the Labor Act as the District Court performs under Title VII. Like the District Court, it must discharge its "final responsibility" (*Alexander, supra*) of seeing to it that the Act's commands are obeyed.

§ 10(c) of the Act (20 U.S.C. § 160(c)) also implies that the Board may not ordinarily sit idly by when unfair labor practices are brought to its attention. It provides, in relevant part (emphasis supplied):

"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, *then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.*"

⁵³ That statement was cited as authoritative on this point in *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 267 (1940).

See *Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940); *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969); *International Woodworkers, etc. v. NLRB*, 380 F.2d 628, 630-631 (D.C. Cir. 1967); *UAW v. NLRB*, 427 F.2d 1330, 1332 (6 Cir. 1970).

We concede *arguendo* (see *infra*), that the Board may defer to arbitration a complaint that a party to a "long established . . . stable and productive relationship,"⁵⁴ acting without hostility to Labor Act principles, has violated the agreement, and as a *consequence*, also violated the Act. But deferral to arbitration of the latest in a continuing series of adjudicated, and alleged present and subsequent violations simply cannot be justified by a need to reduce the Board's caseload (J.A. 847). The resulting piecemeal resolution of individual disputes in arbitration, which the Board here fancied it ordered (J.A. 847),⁵⁵ is precisely the approach which this Court rejected in *Weil-Peterson*, 440 F.2d at 99-100. This Court pointed out there that arbitrators "deciding individual cases might never have found the general pattern of anti-union activity . . ." going to the heart of the collective bargaining relationship which the Board found there but ignored here.

Even more important, as the Board must have recognized in distinguishing *Aircraft* in *National Radio*, arbitration is entirely unsuited to keep a recidivist within the statute's bounds. An arbitrator serves at the pleasure of the parties—both parties. He is thus institutionally unable

⁵⁴ *National Radio Co.*, *supra*, 80 LRRM at 1724. Accord, *Collyer*, 192 NLRB at 842; *id.*, quoting *Jos. Schlitz Brewing Co.*, 175 NLRB 141, 142.

⁵⁵ The Board wrote, "We are not persuaded that, if directed to do so by this Board, the parties here will not make sensible and effective use of their own procedures to resolve the kinds of disputes involved in this proceeding." Of course, the Board had no authority to and did not direct "the parties" here, *i.e.*, the charging party, to "process" Aircraft's violations through grievance and arbitration. Contract enforcement is not "the business of the Board," but of the courts, *NLRB v. Strong*, 393 U.S. 357, 360-361 (1969), as this Court recognized in *Weil-Peterson*, *supra*, 440 F.2d at 99-100.

to deal with a course of conduct designed to undercut statutory rights. Too many decisions adverse to one party, a finding of illegal animus, or too broad a remedy endangers his employment not only by the parties before him, but by others, as well.

The Supreme Court and experts in the field have respected this inherent limitation on arbitrator's institutional capacity.

"This point becomes apparent through consideration of the role of the arbitrator in the system of industrial self-government [footnote omitted]. As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties."

Alexander v. Gardner-Denver Company, 415 U.S. 36, 52-53 (1974). Similarly, many arbitrators regard it as beyond their function to interpret the National Labor Relations Act, *Rowland Tompkins & Son*, 35 Lab. Arb. 154, 156 (1960); *Bethlehem Steel Co.*, 31 Lab. Arb. 423, 426 (1958); *Spartan Mills*, 27 Lab. Arb. 256, 258 (1956), and have urged that to impose public law functions on them would be a serious mistake.⁵⁶

⁵⁶ "If arbitration begins to do the business of the NLRB and the courts, interpreting legislation, effecting national rather than private goals as a kind of subordinate tribunal of the Board, that voluntarism which is the base of its broad acceptance could be eroded and its essential objectives changed. Arbitration can be weakened by freighting it with public law questions which in our system should be decided by the courts and administrative agencies. Arbitration should not be an initial alternative to Board adjudication. It has been (and should be) a separate system of adjudication respecting private rights and duties resulting in final decisions—not decisions on public matters reviewable by the Board and deferred to it not repugnant to the Labor Act." Seitz, *Limits of Arbitration*, 88 Monthly Labor Review 763, at 764 (1965).

Accord, O'Connel, *Should The Scope of Arbitration Be Restructured* in PROCEEDINGS OF EIGHTEENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 102, 120-128 (D. JONES ed. 1965); Meltzer, *Ruminations About Ideology, Law*

The Company and the arbitrators under the parties' agreement share this view. In a recent "fighting" discharge arbitration, one of the petitioners here asked the arbitrator to remedy the Company's refusal to make the statements of a key witness available in the grievance proceedings, as required by the National Labor Relations Act. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967). The Company's Group Director of Industrial Relations objected:

"MR. VANDERVOORT: You are placing this in the wrong posture. We are not suggesting that you should go to the National Labor Relations Board to try to get Mr. Springer [the grievant] reinstated. If you feel we have abridged your rights as bargaining agent by refusing to supply you with information that you are entitled to under the law, that is a question you can take to the Board. We are not suggesting that [you] go to the Arbitrator."

In the Matter of Local 743, IAMAW and Hamilton Standard, April 22, 1974, Tr. 5.⁵⁷ The arbitrator agreed (*id.*, Tr. 6-7):

"THE ARBITRATOR [Benjamin Wolf]: I am not sure that I know the Collier [sic] decision as intimately as you presume I do. But let me say this: Generally speaking I don't regard the arbitration proceeding as a substitute for the NLRB. I regard it as a contractual procedure in which the Labor Relations Arbitrator is not enforcing the National Labor Relations Act. I am well aware of the fact that there are areas in which an arbitrator necessarily must answer on questions which would otherwise be in the province of the National

and Labor Arbitration, in the ARBITRATOR, THE NLRB AND THE COURT: PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1. (D. Jones ed. 1967); Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty*, 49 Ind. L.J. 57, 63 (1973). See also *NLRB v. C & C Plywood*, 385 U.S. 421, 430 (1967).

⁵⁷ A certified copy of the relevant portion of the transcript has been lodged with the Court.

Labor Relations Board. But I don't think it is the Arbitrator's function to serve as a substitute for the National Labor Relations Board.

"I recognize that this is a matter of controversy in the profession. Frankly, my attitude has always been that an Arbitrator is a creature of a contract, is bound by the contract and decides questions under the contract. For me to begin to answer questions which may have been difficult questions even for the NLRB to decide would be presumptuous."

Thus, the Board's deferral to arbitration leads to a predictable contretemps: an arbitral refusal to consider the claim because it lies within the province of the Labor Board. And we are confident that the Court will not miss the significance of the Company's successfully urging the Board not to afford a remedy for its unfair labor practices in the name of deferral to arbitration and subsequently urging the arbitrator to ignore the union's claimed right to information because it is properly cognizable before the Board.

Moreover, arbitrators dealing with recidivists may appraise the facts differently than the Board. Not only are they likely to miss a general pattern of anti-union activity (see 440 F.2d at 99-100, quoted at p. 54, *supra*), but "... rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable [in arbitration]." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974) (emphasis supplied).⁵⁸ Further-

⁵⁸ See also with respect to the limits of discovery in arbitration, *In the Matter of Local 748 IAMAW and Hamilton Standard*, *supra*, Tr. 8; Getman, *Can Collyer and Gardner-Denver Co-Exist*, 43 Ind. L.J. 285, 286 (1974), and pp. 41-46, *supra*.

Discovery in Board proceedings is more limited than in civil trials, but the General Counsel's broad investigative authority and resources are far greater than those of a party in arbitration. See generally *Link v. NLRB*, 330 F.2d 437 (4 Cir. 1964), cited with approval, *NLRB v. Local 138, Operating Engineers*, 71 LRRM 2335, 2336 (2 Cir. 1969). And discovery may be critical in the case of

more, in a case like this, the issues cannot be resolved in a single arbitration proceeding, as can most of the disputes that come before the Board in the context of an otherwise "harmonious and productive" relationship; nor can the Board be confident here that a single award will resolve the underlying controversy and that other unfair labor practices will not follow. On the contrary, to bring a recidivist into compliance with the Act through arbitration, assuming that is possible, requires—and the Board's order contemplates—multiple proceedings at substantial cost to the wronged party.

What is required here, and what the Act contemplates, are court enforced Board orders, backed by the contempt power, to deter Aircraft from committing still more unfair labor practices "*in futuro*."⁵⁰ For the Board has not found—and, on this record, could not find—that Aircraft has for a period of years scrupulously adhered to the requirements of the Act, or even that it did so in this case. Instead, the majority in effect found that Aircraft's strategy of hostility to the policies of the Act did not include a refusal to abide by occasional arbitration awards (J.A. 845). The finding is grossly inadequate to justify the Board's failure to make the rights protected by the National Labor Relations Act a reality for Aircraft's employees and their unions. This Court should reverse. *Provision*

a recidivist like United Aircraft which has in the past misrepresented the facts to various tribunals and withheld information it has been obligated to disclose. See our Brief in this Court in No. 72-1936 at pp. 47-52. See also Brief of the General Counsel to the Trial Examiner, Vol. I, pp. 37-39 & nn. 36, 39; *id.* at 46, 50-52 & n. 49; *id.* at 92.

⁵⁰ See *Amalgamated Workers v. Edison Co.*, 309 U.S. 261, 267-268 (1940), where the Court said (quoting legislative history) (emphasis added):

"Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal."

Arbitrators, of course, have no power to order such remedies.

House Workers Union v. NLRB, 493 F.2d 1249 (9 Cir. 1974) (dictum.) Cf. *Labor Board v. Seven-Up Co.*, 344 U.S. 344, 349 (1953); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 594-595 (2 Cir. 1961).

**B. The Board Erred in Failing To Adjudicate the Allegations
Concerning Sullivan and Urbanowicz**

The Board further abdicated its statutory responsibility by failing to adjudicate those allegations of the General Counsel's complaint relating to Sullivan and Urbanowicz. When the Sullivan and Urbanowicz discharges were arbitrated, the arbitrator found that the Company violated the agreement by disciplining them. But the arbitrator neither passed upon the Sullivan interrogation nor determined whether the Company harassment of him was part of a general pattern of conduct with respect to union supporters. The Trial Examiner found the Sullivan interrogation unlawful but declined to decide whether the disciplining of Sullivan and Urbanowicz violated the Act because in his view such findings "would not add materially to the order in this case" (J.A. 804, 805, 808).

In dismissing the complaint, as we have seen, the Board relied on a non-existent finding by the Examiner that the Sullivan and Urbanowicz suspensions had already been "fully and effectively" remedied. See pp. 49-50, *supra*, n. 49. That error is even more glaring in light of the Charging Party's specific exceptions to the Examiner's failure to make findings and order *additional* relief in light of Aircraft's previous patterns of violation. Furthermore, the Board reversed the Examiner's interrogation finding *sub silentio*.

Even on the Board's limited view of its statutory responsibilities, it was obliged to determine whether the result of the arbitration was repugnant to the policies and purposes of the Act (J.A. 849), *i.e.*, whether the remedy which the arbitrator prescribed for the Sullivan and Ur-

banowicz suspensions was sufficient to *effectuate* the purposes of the Act. See § 10(c) of the Act; *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940); *UAW v. NLRB*, 427 F.2d 1330 (6 Cir. 1970); *International Woodworkers' etc. v. NLRB*, 380 F.2d 628 (D.C. Cir. 1967). And plainly, under a long line of Board precedents it was obligated to adjudicate on the merits the legality of the Sullivan interrogation, which was not before the arbitrator. See *Local 715, IBEW v. NLRB*, 494 F.2d 1136, 1139-1140 (D.C. Cir. 1974) and cases cited therein.

C. The Collyer Rule Is Inconsistent With the Statutory Design

Thus far we have assumed, *arguendo*, that *Collyer, supra*, was rightly decided. But we believe that *Collyer* is inconsistent with Congress' deliberate decision to provide alternative avenues of relief to a party which asserts rights both under a collective bargaining agreement and under the National Labor Relations Act.

In numerous cases, the Supreme Court has held that "... the business of the Board, among other things, is to adjudicate and remedy unfair labor practices," and this authority "is not 'affected by any other means of adjustment . . . that has been . . . established by agreement. . . .'" § 10(a), 61 Stat. 146, 29 U.S.C. § 160(a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither pre-empting the other." *NLRB v. Strong*, 393 U.S. 357, 360, citing, *inter alia*, *NLRB v. C & C Plywood*, 385 U.S. 421; *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261; *Smith v. Evening News*, 371 U.S. 195.

These precedents, to the effect that contractual and statutory remedies are *concurrent*, respect the will of Congress. For, when the House-Senate Conference chose to vest in the courts jurisdiction to enforce contracts by enacting § 301, it also took pains to state in its Report accompanying the revised bill, which became the Act:

"By retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 52.

That is the statutory policy which governs when a party files an unfair labor practice charge with the Board. The *Collyer* doctrine conflicts with Congress' choice because *Collyer* subordinates the statutory remedy before the Board to the contractual remedy before an arbitrator. As the Board itself concedes, it *defers* to the arbitral forum.

Furthermore, as we have seen, the Supreme Court has now squarely held that where Congress has established a system of concurrent remedies, an aggrieved party may not be required to proceed to arbitration as a precondition for adjudication of his statutory claims. *Alexander v. Gardner-Denver Co.*, *supra*. That case involved the interplay of arbitration in Title VII of the Civil Rights Act of 1964, but its reasoning is equally applicable and equally compelling here, as the Court seemed to imply (415 U.S. at 49-50):

"In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights. Where the statutory right underlying

a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act. *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964). Cf. *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). There, as here, the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each."

We recognize that this Court has approved the *Collyer* doctrine. *Nabisco, Inc. v. NLRB*, 479 F.2d 770 (2 Cir. 1973). But there petitioner concedes that the Board could defer to arbitration. Brief for Petitioner, pp. 25-26. Similarly, in *Arnold v. Carpenters' District Council*, 417 U.S. 12 (1974), the Supreme Court referred approvingly to *Collyer*, but no party argued that it was invalid. Thus, both these cases "lack[] the precedential weight of a case involving a truly adversary controversy" with respect to the validity of *Collyer*. *Bob Jones University v. Simon*, 416 U.S. 725, 740, n.11 (1974). See *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399-400 (Marshall, Ch. J.), disavowing "expressions" in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137.

Finally, all the cases wherein the courts of appeal have approved *Collyer*⁶⁰ were either decided or briefed before *Alexander*. In addition, we have examined the briefs in all cases in which the courts have approved *Collyer*. The Congressional policy which we assert here was relied upon in only one of these. Brief for Union Petitioners, *Local 2188*,

⁶⁰ *Nabisco, supra*; *Enterprise Pub. Co. v. NLRB*, 493 F.2d 1024 (1 Cir. 1974); *Local Union 2188*; *IBEW v. NLRB*, 494 F.2d 1087 (D.C. Cir. 1974); *Provision House Workers Union v. NLRB*, 493 F.2d 1249 (9 Cir. 1974) (per curiam); *Associated Press v. NLRB*, 492 F.2d 662 (D.C. Cir. 1974).

etc. v. NLRB, 494 F.2d 1087 (D.C. Cir., 1974). The point was not discussed in the Court's opinion. Accordingly, we submit that this Court can and should reconsider *Nabisco* and hold *Collyer* invalid.

CONCLUSION

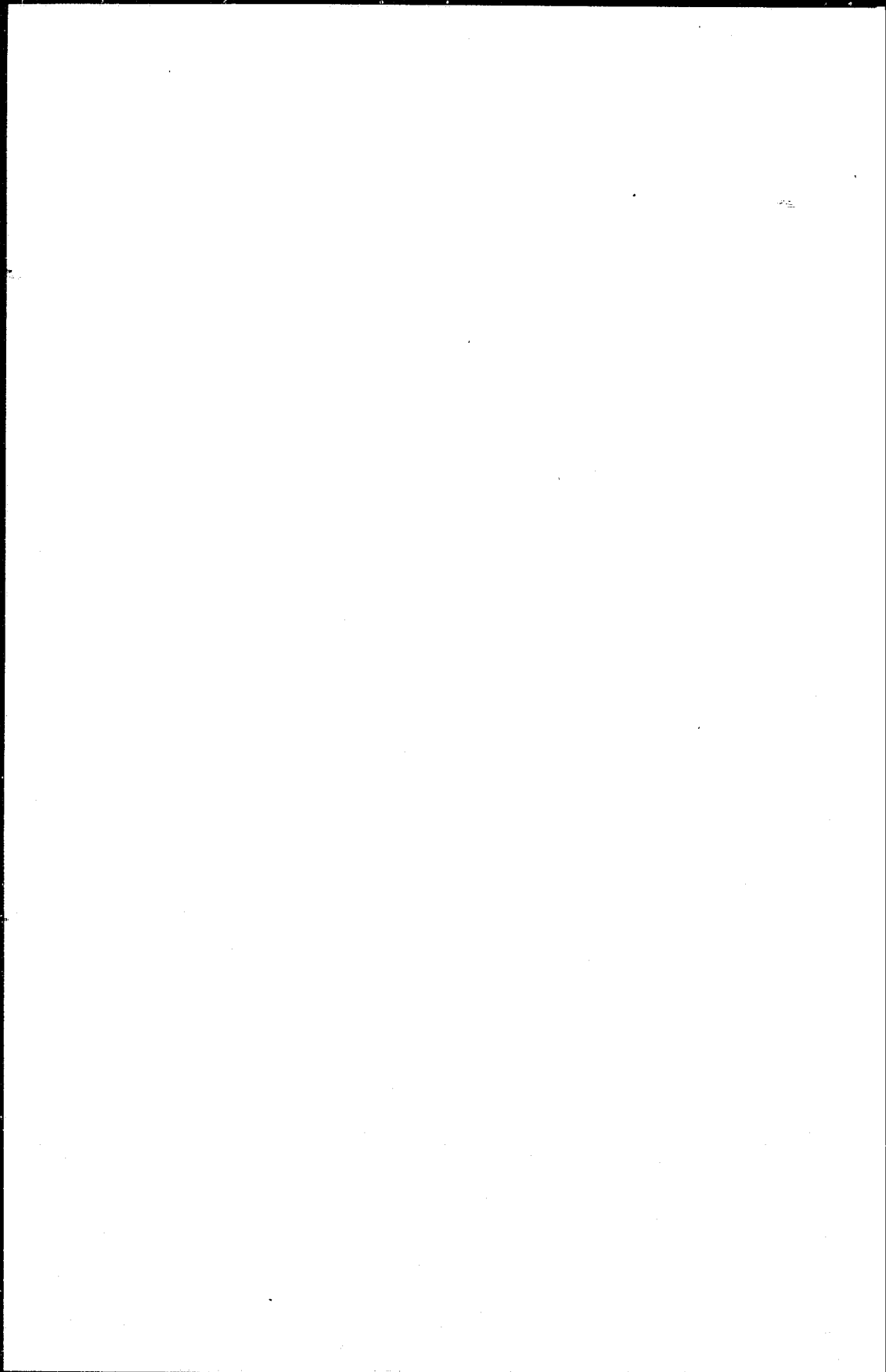
We respectfully request that this Court reverse the Board's decision with instructions to review the Administrative Law Judge's decision on the merits and "effec-
tuate the purposes of the Act" by remedying any unfair labor practices found. Section 10(c) of the Act, 29 U.S.C.A. § 160(c).

Respectfully submitted,

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NATIONAL LABOR RELATIONS BOARD
Washington, D. C.

May 10, 1973

Arbitration Deferral Policy Under Collyer—Revised Guidelines

Since first announcing in *Collyer Insulated Wire*, 192 NLRB No. 150, its policy of deferring to the grievance and arbitration procedures of an existing bargaining agreement, the Board has issued a number of decisions in which it has substantially extended and refined this policy.

As I said in the introduction to the guidelines for regional offices contained in the memorandum entitled "Arbitration Deferral Policy under *Collyer*" which I issued on February 28, 1972, I welcome a policy which encourages the expeditious and private settlement of industrial disputes through deferral on the part of the Board to the arbitral process. For this reason I believe that the public interest will be well served by the extension and development of the *Collyer* policy which is embodied in the decisions which the Board has issued.

We do not yet know the extent to which the *Collyer* policy will be successful in encouraging a gain in the prompt, fair and effective settlement of industrial disputes through private contract procedures. However, I feel that I must do all I can to insure that success by working for the uniform and expeditious application of this policy at the regional office level. The *Collyer* policy has now been expanded by the Board to apply to charges alleging violations of Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (B) and 8(b)(2) and (3), in addition to Section 8(a)(5). For this reason and because there are many cases, rather than one, from which the whole of the policy must be drawn, I feel it time that the February 28, 1972, guidelines should be revised and reissued to reflect the Board's amplified views on the subject. Consequently, I am issuing the attached memorandum which supersedes my earlier

memorandum. To facilitate comparison with the *Collyer* guidelines issued February 28, 1972, this revised memorandum follows a format similar to that of its predecessor.

Where significant changes of the earlier guidelines were required by recent expressions of Board policy and by our experience in the administrative application of the *Collyer* policy, the reasons for the changes are discussed. Some of these changes of particular note are:

1. Broadening the application of the Board's *Collyer* doctrine to all cases in which (a) the issues are susceptible to resolution under the contract grievance-arbitration procedures, and (b) there is no reason to believe that this machinery will not resolve the issues in a manner compatible with *Spielberg* standards;
- 2.(a) Providing the respondent an opportunity to express a willingness to arbitrate the dispute and, thus, to secure deferral of the charge under *Collyer* (where all other requirements for deferral are met), prior to a final determination of the regional office as to the merits of the unfair labor practice charge;
- (b) Requiring as a condition of deferral, that at the latest, respondent express its willingness to arbitrate no more than 7 days after a regional office communicates to the respondent its final determination that the charge is meritorious;
- 3.(a) Refusing to defer under the *Collyer* policy in a dispute over a request for information relevant to grievance processing even though the underlying grievance is already before an arbitrator, and;
- (b) Refusing to defer charges pertaining to the basic, underlying grievance if deferral is inappropriate as to a dispute over a request for information which is relevant to that grievance;
4. Adopting special criteria for the deferral of charges filed by individual employees, and;

5. Providing the charging party the right, under Board Rule 102.19, to appeal a decision of the regional office to defer action on a charge under the *Collyer* policy.

It is my hope that these revised guidelines will assist the regional offices in carrying out the *Collyer* policy in a manner which will best serve the parties to come before the Agency, will encourage the proper disposition of disputes by private procedures and will advance the Board's basic objectives in its adoption and expansion of the *Collyer* policy.

I would emphasize that these revised guidelines are intended to provide broad, generalized criteria for the implementation of the *Collyer* policy in the wide variety of cases to which it will apply. Since these guidelines are, in part, generalizations derived from the Board's published decisions and, in part, procedures for the application of the *Collyer* policy which will be presented for the Board's consideration and adoption or rejection on a case-by-case basis, they cannot be considered "rules" in the conventional sense. Nor can they substitute for the acumen which is necessary for the application of these guidelines to the diverse facts of each particular case in a manner which will best serve the basic essential purposes of the *Collyer* doctrine.

/s/ PETER G. NASH

* * * * *

2. *Information Issues*—Disputes over a union's or employer's request for information relevant and necessary to the administration of the collective bargaining agreement²¹ or to the evaluation, processing and arbitration of grievances should not be deferred for arbitration,²² even

²¹ Cases involving application of *Collyer* deferral policy to disputes over requested information relevant to contract negotiations should be submitted to Washington for advice.

²² See *United-Carr Tennessee a Division of TRW, Inc.*, 202 NLRB No. 112. In assessing the warrant for deferral in disputes over the refusal to furnish

though (a) the contract contains provisions pertaining to such requests for information and the contract makes arbitration available to resolve disputes arising over the denial of requests for such information,²³ or (b) the dispute giving

information relevant to the evaluation and filing of a potential grievance and information relevant and necessary to the processing of a grievance already on file, the Court's decision in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 64 LRRM 2069, would seem to weigh heavily against deferral for arbitration of a dispute over such information. The question presented in that case was the obligation of an employer "to furnish information that allows a union to decide whether to process a grievance." The Court stated that "even if the policy of the Steelworkers Cases [favoring arbitration] were thought to apply with the same vigor to the Board as to the courts, that policy would not require the Board to abstain here." After examination of the employer's obligation to furnish the grievance-related information, the Court found the Board's order to the employer to produce the information, "was consistent both with the express terms of the Labor Act and with the national labor policy favoring arbitration which our decisions have discerned as underlying that law." (Emphasis added.) Further, the Court stated that, "Far from intruding upon the preserve of the arbitrator, the Board's action [in requiring that the information be furnished] was in aid of the arbitral process." See *Fawcett Printing Corp.*, 201 NLRB No. 139.

The Court's decision in *Acme Industrial* would hardly seem to warrant a distinction, for the purpose of applying deferral policy, between information requested for the purpose of deciding whether to file a grievance and information requested for use in the processing and arbitration of a grievance already on file. In the *Acme Industrial* case, the information was requested by the union only after the grievance to which it pertained had been filed. And the information there would have manifestly been of use to the union in the processing and arbitration of the grievance.

Moreover, the distinction between a party's requesting information for the purpose of deciding "whether to process a grievance" and a party's requesting information for the purpose of preparing a grievance for presentation in the grievance-arbitration procedures may be a tenuous one. Even in a dispute in which a union has already invoked the grievance procedures, additional information may cast doubt on the substantive merits of the grievance and may contribute either to an adjustment of the dispute or the abandonment of the grievance. *Fawcett Printing Corp.*, 201 NLRB No. 139.

²³ The Board's adoption of the *Collyer* policy of deferral may provide an additional consideration which now weighs against deferral in the instance of a dispute over information requested in connection with a grievance even where the contract bears on the obligation to furnish this information. Clearly, the unlawful failure to provide information relevant to the arbitration process strikes at the heart of the process itself and inhibits full and fair use of that process. The *Collyer* policy places a substantially greater reliance on private dispute settlement procedures and therefore makes the full availability of information relevant

rise to the request for information is pending in the arbitral forum.²⁴

An unlawful refusal or failure to produce, upon request, information relevant to the evaluation, processing and arbitration of a grievance should not be severed from the dispute which gives rise to the grievance in question and unfair labor practice charge.²⁵ That is, if deferral is re-

to the disposition of grievances even more important. Board enforcement of the duty to furnish relevant information is an additional means of assuring that arbitration awards will be supported by substantial evidence bearing on the contractual and statutory issues raised by the dispute, thereby minimizing the number of cases in which the arbitration fails to meet the "fair and regular" test established by *Spielberg*. Instructive in this regard is the Board's observation in *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB No. 44, that in "declining to intervene in disputes best settled elsewhere we must assure ourselves that those alternative procedures are not only 'fair and regular' but that they are and were open, in fact, for use by the disputants. These considerations caution against our abstention on a claim that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures."

²⁴ In disputes already before an arbitrator, the arbitrator may on request require the production of relevant information. Conceivably, then, some disputes over the duty to furnish information could be deferred for disposition by the arbitrator, with the arbitrator's ruling on information requests being reviewed by the Board in the post-arbitration assessment of the arbitration under the *Spielberg* standards. Yet, upon reflection, it was concluded that such an approach should not be adopted. Thus, it should be recognized that in the dispute over requested information, deferral for disposition by the arbitrator of the underlying dispute would have a particularly anomalous effect in instances in which the requested information pertains to an underlying dispute (such as a mere breach of contract) which is not the subject of an unfair labor practice charge. If the charging party were forced to arbitrate the underlying dispute while it lacked information relevant thereto because the arbitrator refused to require that it be produced and if the charging party were to lose that arbitration, the Board might then decide to proceed on the dispute over the requested information (particularly if the respondent has refused either to supply the information or to arbitrate its refusal). But this would provide small comfort to the charging party, for even if the Board were finally to order that this information be produced, the charging party would have, by that time, already lost in the underlying dispute to which the information would have been relevant. Since the underlying dispute was not subject to an unfair labor practice charge, the Board might be powerless to rectify the result which may have flowed from the respondent's unlawful refusal to provide the requested relevant information.

²⁵ The Board's decision in *George Koch Sons, Inc.*, 199 NLRB No. 26, would seem to require that to the extent the allegations as to the requested information

fused as to the dispute over the union's request for information pursuant to the above guidelines, and that information is relevant to a dispute which is also the subject of a separate unfair labor charge and potential grievance,

cannot be referred for arbitration, the allegations pertaining to the dispute to which the information is relevant cannot be deferred for arbitration. These allegations pertain to but two parts of a single dispute or at least, to closely related disputes which raise one or more common issues.

In the *Koch* case, the union was charged with the violation of Section 8(b)(1)(B) for fining a supervisor and striking the employer because the supervisor worked at terms below those set by the bargaining agreement. In refusing to defer for arbitration of the strike under the contract, the Board said:

Furthermore, since we are in any event required to take jurisdiction in order to determine the issue of whether the fine was violative of our Act, there seems less reason to defer the other issue raised by the complaint; namely, the Union's conduct with respect to the strike. When an entire dispute can adequately be disposed of under the grievance and arbitration machinery, we are favorably inclined toward permitting the parties an opportunity to do so. *One of our reasons for so doing is to avoid litigating the same issues in a multiplicity of forums. But here, since we must perforce determine a part of the dispute, there is far less compelling reason for not permitting the entire dispute to be resolved in a single proceeding.* [Emphasis added.]

Application of this policy would seem particularly appropriate in disputes over requested information for yet another reason. The Board's deferral of the main or underlying dispute for arbitration, while proceeding to litigate the charge based on the refusal to furnish information about the main dispute, would put the charging party in a difficult position and tend to delay unduly the resolution of the main, underlying dispute. Thus, the charging party would be required to proceed immediately to arbitration of the main dispute while it lacked information relevant thereto to which it is entitled—or the charging party would, in the alternative, be required to secure a postponement in the arbitration proceeding until the information issue is litigated in an unfair labor practice proceeding and the Board, or an appellate court, issues an order compelling production of the disputed information. To put the charging party to this choice would obviously tend to defeat the objectives of the *Collyer* policy of encouraging the quick and fair resolution of disputes. Furthermore, if the Board holds that a disputed action giving rise to a charge and a disputed refusal to furnish information as to that action, also giving rise to a charge, cannot be separated for the purposes of applying *Collyer* deferral policy, then the respondent who seeks deferral of the charge as to the underlying dispute may be encouraged to furnish information relevant thereto if its failure to do so will operate to preclude deferral as to the underlying disputes.

A-7

deferral of the latter charge for arbitration should also be refused.²⁶

²⁶ For example, if a charge or charges are filed alleging violations of the Act based on the respondent's unilateral change of employment conditions and the respondent's failure to produce requested information relevant to the processing of a grievance challenging that change deferral of the charge based on the unilateral change would be inappropriate if the information issue itself is not deferrable. But if after the region communicates to respondent its intention to issue a complaint on the refusal of information charge, the respondent supplies the information, the unilateral change issue may be deferred in accordance with the *Collyer* policy. Otherwise the region should proceed to a Section 8(a)(5) complaint on both the unilateral change and information issues.

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

—
No. 74-1035
—

Lodges 700, 743, and 1746, International Association of
Machinists and Aerospace Workers, AFL-CIO, Petitioners,

v.

National Labor Relations Board and United Aircraft
Corporation
—

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